DOCKET

No. 07-636

Title: Kari E. Kennedy, et al., Petitioners

v.

Plan Administrator for DuPont Savings and Investment Plan, et al.

Docketed: November 15, 2007

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (05-41851)

Decision Date: August 15, 2007

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 13 2007	Petition for a writ of certiorari filed. (Response due December 17, 2007)
Dec 4 2007	Order extending time to file response to petition to and including January 16, 2008.
Jan 15 2008	Brief of respondents E.I DuPont De Nemours and Company, et al. in opposition filed.
Jan 24 2008	Reply of petitioner Kari E. Kennedy filed.
Jan 30 2008	DISTRIBUTED for Conference of February 15, 2008.
Feb 19 2008	Petition GRANTED limited to Question 3 presented by the petition.
Mar 4 2008	Record received from U.S.C.A. for the 5th Circuit. (1 envelope)
Mar 12 2008	Record received from the U.S.D.C. for the Eastern District of Texas. (1 box)
Mar 20 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including May 5, 2008.
May 5 2008	Joint appendix filed. (Statement of costs received)
May 5 2008	Brief of petitioners Kari E. Kennedy, et al. filed.
May 12 2008	Brief amicus curiae of AARP in support of neither party filed.
May 12 2008	Brief amicus curiae of United States in support of neither party filed.
May 28 2008	The time within which to file respondents' brief on the merits is extended to and including July 8, 2008.
Jun 9 2008	SET FOR ARGUMENT ON Tuesday October 7, 2008.
Jul 3 2008	CIRCULATED
Jul 8 2008	Brief of respondents Plan Administrator for DuPont Savings and Investment Plan, et al. filed. (DISTRIBUTED)
Jul 15 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 15 2008	Brief amicus curiae of Western Conference of Teamsters Pension Trust Fund filed. (Distributed)
Jul 15 2008	Motion for leave to file amici brief filed by American Benefits Council, et al.

Jul 17 2008	Opposition of petitioners in response to motion of amici American Benefits Council, et al. for leave to file a brief as amici curiae.
Jul 22 2008	Letter of consent to the filing of the motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument from counsel for the petitioner filed.
Aug 7 2008	Reply of petitioners Kari E. Kennedy, et al. filed. (Distributed)
Sep 5 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 5 2008	Motion for leave to file amici brief filed by American Benefits Council, et al. GRANTED.
Sep 30 2008	Exhibits received from the U.S.D.C. for the Eastern District of Texas.
Oct 7 2008	Argued. For petitioners: David A. Furlow, Houston, Tex. For United States as amicus curiae: Leondra R. Kruger, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondents: Mark I. Levy, Washington, D.C.
Oct 28 2008	The parties are directed to file supplemental briefs addressing the following question: Whether 29 U.S.C. §1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar. The briefs, not to exceed 4,500 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 10, 2008. Amicus curiae briefs, not to exceed 3,000 words, may be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., Monday, November 10, 2008.
Nov 10 2008	Supplemental brief of respondents filed. (Distributed)
Nov 10 2008	Supplemental brief of petitioners filed. (Distributed)
Nov 10 2008	Supplemental brief of United States supporting respondents filed. (Distributed)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
NOV 13 2007
OFFICE OF THE CLERK

No. 07-636

In The
Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Estate of the late William P. Kennedy the proper recipient of the pension funds in his DuPont Savings and Investment Plan, as opposed to Mr. Kennedy's Ex-Wife Liv Kennedy, who entered into a 1994 divorce-decree that voluntarily waived those SIP benefits under federal common law and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA")?

2. Does federal common law, as applied to Ex-Spouse Liv Kennedy's waiver of any right to receive William P. Kennedy's pension benefits in a 1994 divorce-decree, govern the judicial determination of whether DuPont's Plan Administrator wrongfully paid Mr. Kennedy's SIP benefits to his ex-spouse Liv Kennedy, as the District Court ruled, or was that court restricted to examining only DuPont's "Plan Document," that is, the late William P. Kennedy's 1974 beneficiary designation of his then-wife?

3. Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits under ERISA?

4. What legal standards govern the award of fees to prevailing parties under ERISA (an issue of first impression for this Court)?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioners:	Kari Ellen Kennedy, Independent Executrix of the Estate of William Patrick Kennedy (the "Executrix").
Respondents:	The Plan Administrator for DuPont Savings and Investment Plan and E. I. DuPont de Nemours & Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kari Ellen Kennedy is an individual who does not fall within the scope of Supreme Court Rule 29.6's disclosure requirement.

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KARI ELLEN KENNEDY, Independent Executrix of the Estate of William Patrick Kennedy, Deceased, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (APP. 1 at 1-14) is published at 497 F.3d 426. The United States District Court for the Eastern District of Texas's final judgment (APP. 2 at 15-18), order on motion for attorney's fees (APP. 3 at 19-30) and order on motions for summary judgment (APP. 4 at 31-52) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2007. This Court has federal question jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act, 29 U.S.C §§ 1001 *et seq.* ("ERISA"); ERISA's Anti-Alienation provision, 29 U.S.C. § 1056(d)(1), and the Retired Equity Act's ("REA's") Qualified Domestic

Relations Order provision, 29 U.S.C. § 1056(d)(3), collectively APP. 7; ERISA's Fiduciary Duties Provision, 29 U.S.C. § 1104, APP. 8; and the ERISA Attorney's Fees Provision, 29 U.S.C. § 1132(g)(1), APP. 9, are involved in this appeal.

STATEMENT OF THE CASE

This is an ERISA appeal involving a divorce-related dispute about entitlement to pension benefits that pits the estate of a deceased, former DuPont employee/participant in DuPont's Savings and Investment Plan (the "SIP") against his ex-wife. The DuPont SIP is an "employee pension benefit plan" under ERISA, 29 U.S.C. § 1002(2).

A. William P. Kennedy's employment at DuPont and marriage to Liv Kennedy.

On June 30, 1971, the late William Patrick Kennedy ("Decedent Kennedy"), while working for DuPont, married Liv Kennedy (now, "Ex-Wife Kennedy"). APP. 4 at 32. While married, Kennedy signed a DuPont beneficiary designation form on December 6, 1974 (and again on July 21, 1980) that identified Liv, his then-wife, as the sole beneficiary of his SIP account. *Id.* at 32-33. Decedent Kennedy named no other or contingent SIP beneficiaries. *Id.*

B. William P. Kennedy's 1994 divorce and Ex-Wife Liv Kennedy's waiver of her right to receive her ex-husband's SIP benefits through the Kennedy divorce decree.

Decedent Kennedy divorced his wife Liv on June 2, 1994, resulting in a Final Decree of Divorce. APP. 4 at 33. Under that divorce decree, Ex-Wife Kennedy voluntarily agreed to her divestment of "all right, title, interest, and claim in and to . . . the proceeds therefrom, and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [decedent's] employment." APP. 1 at 2 (497 F.3d at 427-28) and APP. 6.

William P. Kennedy and Ex-Wife Liv Kennedy's attorneys prepared an ERISA Qualified Domestic Relations Order ("QDRO") under 29 U.S.C. § 1056(d)(3)(B)(i), and later amended it, receiving divorce court approval. It provided benefit-disbursement instructions for *part* of decedent's non-SIP employee-benefit plans, which are not disputed in this case. The divorcing Kennedys did not prepare a separate QDRO for the SIP in this appeal.

C. William P. Kennedy retired from DuPont in 1998 and died in 2001 without changing his 1974 beneficiary designation of Ex-Wife Liv in his DuPont pension plan.

William P. Kennedy retired from DuPont in 1998. He died in 2001. His death occurred seven years after divorcing Ex-Wife Kennedy, and twenty-seven years

after he executed the DuPont SIP that named his then-wife as his sole beneficiary. He died without replacing Ex-Wife Kennedy as his SIP beneficiary.

D. The Kennedy Estate sued to recover $402,000 in pension benefits DuPont paid to Ex-Spouse Liv Kennedy without first filing an interpleader action to determine their ownership.

Kari Kennedy, the daughter of decedent and Liv Kennedy, was appointed Executrix of Decedent Kennedy's Estate. APP. 1 at 3. In letters to DuPont, Kari Kennedy (the Estate) demanded that her father's SIP funds be distributed to the Estate and pointed out that the Ex-Wife, Liv Kennedy, had voluntarily waived her right to receive her ex-husband's pension benefits under Texas Family Code § 9.302 (a law providing that a spouse's designation as a beneficiary is invalidated by a later divorce). APP. 1 at 3-4.

DuPont refused to pay Decedent Kennedy's pension benefits to the Estate, relying on the SIP beneficiary-designation to justify its payment, instead, to Decedent Kennedy's Ex-Wife Liv. *Id.* at 4. The Estate requested Liv Kennedy to relinquish her SIP interest, but she refused, and DuPont paid Ex-Wife Kennedy the SIP balance of some $402,000. *Id.* at 3.

Seeking to recover the SIP benefits, the Estate filed this claim under 29 U.S.C. § 1132(a)(1)(B) alleging that Ex-Wife Kennedy voluntarily waived her

rights by filing for divorce and entering into a divorce decree and that DuPont had misdirected SIP benefits by paying them to Ex-Wife Kennedy. APP. 1 at 3; APP. 4 at 33-34. DuPont filed a third-party suit against Ex-Wife Kennedy and demanded return of the SIP benefits, a claim it later settled. APP. 1 at 3-4; APP. 4 at 34. Although it is not part of this Record, Liv Kennedy died on July 7, 2007 in Norway. Liv's death does not resolve the issues in this appeal.

The parties filed cross-motions for summary judgment. APP. 4 at 32-36. The district court granted summary judgment after concluding that Ex-Wife Liv Kennedy had waived her right to SIP benefits by entering into a divorce decree enforceable under Federal Common Law. *Id.* at 41-43.

"In this case," the district court ruled, "the decedent had no reason to submit a QDRO to the SIP due to the fact that none of the proceeds of that account were subject to division in the divorce." APP. 4 at 44. The district court relied on ERISA; the Retirement Equity Act's QDRO amendment to ERISA; this Court's rulings in *Boggs v. Boggs,* 520 U.S. 833 (1997) and *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); the Fifth Circuit's rulings in *Brandon v. Travelers Insurance Company,* 18 F.3d 1321, 1324 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995) and *Stobnicki v. Textron, Inc.,* 868 F.2d 1460, 1465 (5th Cir. 1989); and the Seventh Circuit's opinion in *Fox Valley & Vicinity Construction Workers' Pension Fund v. Brown,* 897 F.2d 275, 277-80 (7th Cir. 1990), *cert. denied,* 498 U.S. 820 (1990). APP. 4 at 43-45. The district court concluded that "the benefits were

wrongly paid to Mrs. Kennedy" and awarded the Estate $402,152.56 equal to the SIP funds DuPont paid to Ex-Spouse Kennedy. *Id.* at 45.

Although the Executrix had been acting in a fiduciary capacity and had prevailed on its substantive claim, and although DuPont had been on notice of the Estate's claim when it acted without filing an interpleader to determine the SIP funds' owner, the district court awarded no attorney's fees to the Estate. APP. 3 at 19-30. It held, *inter alia,* that DuPont had not shown enough "culpability" under the Fifth Circuit's five-factor abuse of discretion test in *Dial v. NFL Players Supplemental Disability Plan,* 174 F.3d 606, 614 (5th Cir. 1999) to warrant reversal. APP. 3 at 24-26.

E. The Fifth Circuit, basing its decision on ERISA's anti-alienation and REA's QDRO provisions, reversed the district court's award to the Estate.

The Estate defended the district court's judgment in DuPont's Fifth Circuit appeal by arguing that ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), does not apply to the knowing, intentional waiver of beneficiary rights, the subject of this appeal. The Estate explained that Federal Common Law determined the outcome of issues involving waiver of beneficiary rights. *Id.* at 11-16.

On appeal, the Estate averred that a beneficiary can alter or avoid her right to receive ERISA benefits

by means other than a QDRO, a position consistent with the Fifth Circuit's prior, pro-waiver decisions in *Rhoades v. Casey,* 196 F.3d 592 (5th Cir. 1999) and *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001), as well as the circuit's post-*Egelhoff* precedent in *Guardian Life Ins. Co. v. Finch,* 395 F.3d 238 (5th 2004). *See* Appellee's Brief at 7-17. The Estate cross-appealed the district court's refusal to award attorney's fees, challenging that decision as an abuse of discretion on pages 32-52 of its Appellee's Brief and throughout its Cross-Appellant's Brief.

On August 15, 2007, the Fifth Circuit reversed the district court's judgment awarding the Estate the value of William P. Kennedy's SIP funds. APP. 1 at 5-10. It noted that Mr. Kennedy had not memorialized his de-designation of Ex-Wife Kennedy in a QDRO and ruled that the absence of a QDRO precluded enforcement of Ex-Wife Kennedy's divorce-decree waiver. *Id.* at 5-10. It ruled that, "[i]n the marital-dissolution context, the QDRO provisions supply the *sole* exception to the anti-alienation provision; they exempt a state domestic-relations order determined to be a QDRO, under the standards set forth in ERISA." APP. 1 at 9-10. ERISA's QDRO provision, 29 U.S.C. § 1056(d)(3)(A), states that the anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, *except that . . . [it] shall not apply if the order is determined to be a [QDRO]*" (emphasis

added). The Fifth Circuit affirmed the district court's denial of attorney's fees to the Estate and re-affirmed the validity of the ERISA five-factor test. *Id.* at 11-14.

REASONS FOR GRANTING THE PETITION

This Court should review the Fifth Circuit's August 15, 2007 decision for two reasons. First, this appeal offers this Court an excellent opportunity to heal the multiple fractures dividing the circuit courts and state supreme courts about whether ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), and its QDRO provision, 29 U.S.C. § 1056(d)(3)(B), negate a non-participant beneficiary's voluntary divorce-court waiver of ERISA benefits. The Fifth Circuit abandoned prior precedent by holding that a divorce-court waiver is enforceable *only* if memorialized in a QDRO, further confusing a chaotic body of law that has grown ever more muddled during the past seventeen years. Second, this Court has never decided what standard governs the recovery of attorney's fees in ERISA cases. The Court should grant *certiorari* to resolve these multiple circuit conflicts and correct the Fifth Circuit's erroneous decision.

I. The circuits and state supreme courts are divided – and dividing further – about whether federal common law or only plan-documents control the determination of whether an ex-spouse's voluntary divorce-decree waiver of pension benefits trumps ERISA's anti-alienation provision.

Section 1144(a) of ERISA states that the statute supersedes all state laws that relate to any employment benefit plan. But when ERISA does not expressly address a particular issue of state law, such as beneficiary designations, circuit and state supreme courts have reached remarkably different conclusions, producing a multipolar hodge-podge of contrasting, conflicting interpretations of federal law.

The first, and now ever-widening, ERISA split has existed for at least seventeen years. It divides the majority "Federal Common Law" courts that look to federal common law in interpreting voluntary waivers from the minority "Plan Documents" courts that refuse to look past corporate plan documents. Most courts follow this Court's lead in ERISA cases by using federal common law as the starting point in ERISA statutory analysis. *Varity Corp. v. Howe*, 516 U.S. 489, 498, 502 (1996).

A. The "Federal Common Law" courts.

The "Federal Common Law" courts include the First Circuit (a district court), the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, and almost all

state courts. First Circuit: *Metropolitan Life Ins. Co. v. Flinkstrom*, 303 F.Supp.2d 34, 39-43 (D. Mass. 2004); Fourth Circuit: *In re Estate of Altobelli v. International Bus. Machines Corp.*, 77 F.3d 78, 81-82 (4th Cir. 1996); Fifth Circuit: *Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 355 (5th Cir. 1991); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer*, 354 F.3d 348, 359 (5th Cir. 2003), *rhg. and rhg. en banc denied*, 89 Fed. Appx. 905 (5th Cir. 2004), *cert. denied*, 541 U.S. 1072 (U.S. 2004); Seventh Circuit: *Melton v. Melton*, 324 F.3d 941, 945 (7th Cir. 2003); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 280-81 (7th Cir.) (*en banc*), *cert. denied*, 498 U.S. 820 (1990); Eighth Circuit: *National Auto Dealers & Assocs. Retirement Trust v. Arbeitman*, 89 F.3d 496, 500 (8th Cir. 1996); *Hill v. AT&T Corp.*, 125 F.3d 646, 648 (8th Cir. 1997); *Mohamed v. Kerr*, 53 F.3d 911, 914 (8th Cir. 1995), *cert. denied*, 516 U.S. 868 (1995); *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693-94 (8th Cir. 1989); Tenth Circuit: *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904, 907 (10th Cir. 1991); Michigan: *MacInnes v. MacInnes*, 677 N.W.2d 889, 893-894 (Mich. Ct. App. 2004); Nebraska: *Strong v. Omaha Constr. Ind. Pension Plan, Inc.*, 270 Neb. 1, 701 N.W.2d 320 (Neb. 2005) (*per curiam*); New York: *Silber v. Silber*, 99 N.Y.2d 395, 404, 786 N.E.2d 1263 (N.Y. 2003); and Texas: *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003).

B. The "Plan Documents" courts.

The opposing "Plan Documents" minority courts include the Second, Third and Sixth Circuits. *See, e.g.*, Second Circuit: *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2nd Cir. 1993); Third Circuit: *McGowan v. NJR Service Corp.*, 423 F.3d 241, 244-45 (3rd Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1118, 166 L. Ed. 2d 906 (2007) (Maj. Op.) (explaining the "Federal Common Law" approach but applying the minority "Plan Documents" approach to hold a waiver invalid); Sixth Circuit: *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990) (applying the "Plan Documents" approach to hold a divorce-waiver invalid); *Metropolitan Life Ins. Co. v. Marsh,* 119 F.3d 415, 421 (6th Cir. 1997); *Metropolitan Life Ins. Co. v. Pressley,* 82 F.3d 126, 130 (6th Cir. 1996).

C. The new QDRO circuit-split.

A recent split within the Federal Common Law camp separates "QDRO – *one* form of waiver" from "QDRO is the *only* waiver" courts. The "QDRO – *one* form of waiver" courts hold that a beneficiary of a *pension* plan can waive benefits through a divorce decree. *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 897 F.2d 275, 280-81 (7th Cir.) (*en banc*), *cert. denied,* 498 U.S. 820 (1990); *McGowan,* 423 F.3d at 256-260 (Fuentes, J., dissenting); *Keen v. Weaver,* 121 S.W.3d 721, 724-26 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003).

The "QDRO is the *only* waiver" courts conclude that the QDRO provision, coupled with ERISA's anti-alienation clause, preclude enforcement of an ex-spouse's voluntary divorce-court waiver of pension benefits. *McGowan v. NJR Service Corp.*, 423 F.3d 241, 244-45 (3rd Cir. 2005); *Smith v. E. I. DuPont de Nemours & Co.*, 402 F.Supp.2d 519, 523 (D. Del. 2005). *Cf. Hamilton v. Washington State Plumbing & Pipefitting Indus. Pension Plan*, 433 F.3d 1091, 1100 n.10 (9th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 86, 166 L. Ed. 2d 32 (U.S. Oct. 2, 2006) (citing *McGowan* in its analysis of QDRO law); *Alberici Corp. v. Davis*, No. 4:04-CV-545 CEJ, 2006 U.S. Dist. LEXIS 68539 at *7-12 (E.D. Mo. Sept. 12, 2006), *aff'd*, 186 Fed. Appx. 690 (8th Cir. 2006) (*per curiam*). The Fifth Circuit joined this "QDRO – *Only* Form of Waiver" faction in this case. *See Kennedy v. Plan Adm'r for the DuPont Sav. & Inv. Plan*, 497 F.3d 426, 431-32 (5th Cir. 2007).

D. A case simpler and more *certiorari*-worthy than *McGowan v. NJR Service Corporation*.

This case is more *certiorari*-worthy than *McGowan v. NJR Service Corporation*, 423 F.3d 241, 244-45 (3rd Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1118, 166 L. Ed. 2d 906 (U.S. 2007), the ERISA/ waiver case this Court considered last year. While the three-way division of the judges on the *McGowan* panel mirrors the broadening conflict among the courts of appeals and state courts about whether a

purported waiver by an ERISA beneficiary must be given binding effect as a matter of federal common law, there are substantial reasons to believe that courts that had enforced waivers as a matter of federal common law in other circumstances would not have done so in the context of *McGowan's* post-retirement, Qualified Joint Survivor Annuity under 29 U.S.C. § 1055 ("QJSA").

The Federal Common Law versus Plan-Documents divide, and the more recent schism about QDROs and anti-alienation provisions, are important to pension-plan participants, beneficiaries, plan administrators, the Department of Labor, and state and federal courts. *McGowan*, which arose in an unusual factual context that implicates special rules on which there was no conflict, presented a less appropriate vehicle to resolve the broader questions of common law waiver that divide our courts. Accordingly, this petition should be granted despite the denial of the petition in *McGowan*.

E. A case in the collision-prone intersection of pension, family, and common law.

The issues in this appeal have a nationwide impact. According to the Department of Labor's *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2006* (U.S. Bureau of Labor Statistics, Aug. 2006), fifty-four percent (54%) of workers had access to retirement plans, and fifty-one percent (51%) participated in a

retirement plan of at least one type. *Id.* at p. 1, Summary 06-05, and Tables 7 and 8, available at http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf.

In 2005, the last year for which figures are reported, there were some 2,230,000 marriages in the United States. The marriage rate that year, per 1,000 people, was seven and one-half percent (7.5%), while the divorce rate was three point six percent (3.6). Thus, a little less than half of current marriages, or a little more than a million per year, now end in divorce. *See* http://divorcemag.com/statistics/statsUS.shtml (quoting U.S. Census Bureau and National Center for Health Statistics). Since fifty-one percent (51%) of workers have pension plans, an appeal about pension payments in a divorce context could have a major impact on approximately 300,000 to 400,000 divorcing workers per year, and on their families, friends, and beneficiaries as well.

To put it simply, an appeal that examines the intersection of divorce, pension, and common law – an intersection fraught with case law collisions – will clarify important issues that affect millions of pension-plan participants whose marriages end in divorce, as well as many others. This is a *certiorari*-worthy case.

II. The Fifth Circuit erred in holding that ERISA's QDRO provision is the *only* way a divorcing spouse can waive an ex-spouse's pension benefits under ERISA's anti-alienation provision.

The Fifth Circuit erred in this case, in a manner harmful to justice on a nationwide level, by holding that the ERISA/REA QDRO provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the *only* form that a divorcing spouse can use to waive her right to receive her ex-husband's pension benefits under ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1).

A. The Federal Common Law approach comports with ERISA's intent, legislative history, and the REA amendment, which introduced the QDRO safe-harbor to clarify the law of waiver, not to displace it.

A Federal Common Law analysis makes more sense than the Fifth Circuit's "QDRO is the *only* waiver" rule because the traditional approach comports with ERISA's overriding purpose of ensuring that employees "receive the pensions and other benefits that they were led to believe they would receive upon retirement." *See* Ryan P. Barry, Comment, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary*, 31 CONN. L. REV. 735 (1999) (citing Welfare and Pension Plan Legislation: hearings on H.R. 2 and H.R. 462 before the H. SUBCOMM. ON LABOR OF THE COMM. ON EDUC. AND LABOR, PART 2, 93D CONG. 1 (1973) (statement of Rep. John

H. Dent, Chairman, Subcomm. On Labor) and 120 CONG. REC. H29, 197 (1974) (Rep. John Dent). *See also* 29 U.S.C. §§ 1001-1461 (1994); Pub. L. No. 93-406, 88 Stat. 829 (1974).

A review of ERISA's legislative history demonstrates that the statute's overriding purpose is to protect the interests of participants and beneficiaries, and that enhancement of plan-administrators' convenience was always a secondary objective.

In the late 1960s, New York Senator Jacob Javits first proposed the tax bill that later evolved into a labor bill and eventually resulted in ERISA. *See* Keron A. Wright, *Stuck on You: The Inability of an Ex-Spouse to Waive Rights under an ERISA Pension Plan* [*McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005)], 45 WASHBURN L.J. 687, 703 n.165 (Spring 2006), *citing* Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 IOWA L. REV. 431, 444 (1991). Congressional hearings led to recommendations that later evolved into important ERISA provisions. *See* Wright, *Stuck on You*, 45 WASHBURN L.J. at 703.

Senator Javits proposed the legislation that became the earliest draft of ERISA, styled the Welfare and Pension Plans Disclosure Act. *See* 119 CONG. REC. 127, 12075 (1973). He noted that his amendment to existing law was aimed at "strengthening greatly the disclosure requirements [and] . . . establishing fiduciary standards to protect the rights of workers

covered by . . . pension benefit[] plans." *Id.* "The fundamental purpose," he explained, was to protect the "interests of the participants and beneficiaries of employee welfare and pension benefit plans." *Id.*

Senator Javits explained that Congress intended federal courts to develop substantive law to address issues regarding rights and obligations under the plans, foreseeing the development of a federal common law of ERISA. *See* Wright, 45 WASHBURN L.J. at 703 at n.172, (citing Michael J. Collins, *It's Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation,* 16 LAB. LAW. 391, 399 n.61 (2001) (citing 120 CONG. REC. 29942 (1974))). "In addition, Senator Williams compared ERISA to the Labor-Management Relations Act of 1947, which had a well-developed common law at the time of ERISA's passage." *Id.* (citing 120 CONG. REC. 29933 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5188). Senator Javits explained that ERISA was intended to serve as "a pension 'bill of rights.'" 120 CONG. REC. 29935 (1974).

Prior to the bill's enactment in 1974, the Chair of the General Subcommittee on Labor explained that the bill's "most important purpose will be to assure American workers that they may look forward . . . to a retirement with financial security and dignity." H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646. The bill became known as the Retirement Income Security for Employees Act ("ERISA"). *See* 119 CONG. REC. 318, 30392 (1973). The history of ERISA shows that Congress intended

ERISA to encompass common law and fiduciary duty principles to ensure the protection of participants and beneficiaries.

On Labor Day, 1974, President Gerald Ford signed into law the Employee Retirement Income Security Act of 1974. *See* Wright, 45 WASHBURN L.J. at 690 n.31, (citing James A. Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* 1 (2004) (referencing SEN. COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 at 4747 (Comm. Print 1976))). President Ford explained that, "this is really an historic Labor Day, historic in the sense that this legislation will probably give more benefits and rights and success in the area of labor-management than almost anything in the history of this country." *Id.*

This Court analyzed ERISA's legislative history and emphasized the statute's focus on providing benefits. *See Boggs v. Boggs,* 520 U.S. 833, 852 (1997) ("Besides the anti-alienation provision, Congress has enacted other protective measures to guarantee that retirement funds are there when a plan's participants and beneficiaries expect them."). The legislative history indicates that ERISA "is concerned with improving the fairness and effectiveness of qualified retirement plans in their role of providing retirement income." H.R. REP. NO. 93-807, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4676.

In 1984, Congress enacted the Retirement Equity Act that amended ERISA to create QDROs. The REA did so to provide a clear safe-harbor mechanism for recognizing the interest of a non-participant spouse interested in protecting her right to receive benefits under ERISA retirement plans. *See, e.g., Dorn v. Int'l Bhd. of Elec. Workers,* 211 F.3d 938, 942 (5th Cir. 2000).

As amended, ERISA requires a pension plan to prohibit the alienation or assignment of benefits. 29 USC § 1056(d)(1). This "spendthrift" provision is designed to "ensure that the employee's accrued benefits are actually available for retirement purposes," by preventing unwise assignment or alienation. H.R. REP. NO. 807, 93rd Cong., 2d Sess. 1974, *reprinted in* 1974 U.S.C.C.A.N. 4639 at 4670, 4734. In short, Congress did not want pension plan participants squandering their life savings on trips to Vegas, timeshares, and lavish, pre-retirement lifestyles.

Congress intended QDROs to serve as *one* exception to ERISA's general prohibition on alienation or assignment of benefits to allow the attachment of an employee's pension benefits to satisfy his or her family support obligations. *See* S. REP. NO. 575, 98th Cong., 2d Sess. 18-19, *reprinted in* 1984 U.S.C.C.A.N. 2547 and 2564-65. Congress's Subcommittee on Labor stated that ERISA was enacted to ensure American employees a retirement with "financial security and dignity." *See* H.R. REP. NO. 95-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646.

The 1984 REA amendments made clear that a QDRO was *a* proper method for preserving the interests of a former spouse in pension benefits. *See* S. REP. NO. 575, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S.C.C.A.N. 2547 at 2565. That legislative history indicates that the Congress enacting the REA did not view a QDRO as *conflicting* with ERISA's anti-alienation provision.

The Senate Committee Report on the REA states that "in the case of a [QDRO], the bill *clarifies* that such order does not result in a prohibited assignment or alienation of benefits under the spendthrift provisions of the Code or ERISA." *See* SEN REP. NO. 98-575, at 3 (1984) (emphasis supplied), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2549.

The important term "clarifies" demonstrates that the 1984 Congress did not view the anti-alienation provision as applying to QDROs, even prior to the adoption of REA. Congress' choice of *clarifying* language suggests that its members viewed the anti-alienation provision as containing certain inherent exceptions. *See, e.g., Tenneco, Inc. v. First Va. Bank of Tidewater*, 698 F.2d 688, 690 (4th Cir. 1983). In *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), this Court noted that,

> Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction . . . the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,

> especially when Congress has refused to alter the administrative construction.

Id. at 381-82. This Court properly gives due consideration to Congress' intent to clarify a statutory scheme that already recognized and retained the existence of waivers to ERISA's anti-alienation provision while providing an additional safe harbor QDRO provision to protect the interests of divorcing spouses when that protection makes sense. ERISA's legislative history weighs heavily against the argument that the 1984 Congress intended QDROs to be the only exception to the anti-alienation provision in divorce proceedings.

B. Given Ex-Wife Kennedy's divorce-decree waiver of pension benefits, there was no need for the QDRO's protections here, so the Fifth Circuit thwarted the expectations of Decedent Kennedy and conferred a windfall on Ex-Wife Kennedy.

There was no need for the divorcing Kennedys to submit a QDRO for the SIP benefits because none of the remaining proceeds were subject to property-division in divorce court. APP. 4 at 44 (district court opinion). After all, Ex-Wife Kennedy had agreed that she would receive no SIP benefits belonging to William P. Kennedy.

A QDRO creates a right to benefits in the alternate payee, but it does not reflect a *waiver* of rights. It is a positive *assignment* of a participant's retirement

benefit proceeds rather than a negative *disclaimer* of those benefits. Unless Ex-Wife Kennedy was to receive a portion of the SIP benefits, submitting a QDRO covering SIP benefits would have made no sense to the Kennedys or their divorce lawyers.

The divorcing Kennedys agreed that Ex-Wife Kennedy had no right to receive William P. Kennedy's SIP benefits. Decedent Kennedy never submitted a QDRO covering the SIP benefits. If the Kennedys had wished to provide Ex-Wife Kennedy with an interest in the SIP benefits, they would have executed a QDRO establishing such a right.

DuPont's SIP benefits at issue here did not become payable at retirement but only on Decedent Kennedy's death. Ex-Wife Kennedy had no right to receive those benefits during Decedent Kennedy's life. Application of the spendthrift provisions of ERISA to Ex-Wife Kennedy's waiver of benefits does not further the protect-benefits-until-retirement purpose of the anti-alienation statute.

As this Court has noted, the purpose of the spendthrift clause is to safeguard a stream of income for pensioners and their dependents. To bar a waiver in favor of the pensioner himself would not advance that purpose. *In re Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78 (4th Cir. 1996) (quoting *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990)).

C. A flexible Federal Common Law approach, as opposed to the Fifth Circuit's "QDRO is the *only* waiver" approach, avoids thwarting the expectations of participants, heirs, and beneficiaries.

Opinions that refuse to recognize an exception to ERISA's anti-alienation provisions for an explicit, voluntary waiver foster absurd results. As the dissent recognized in *Egelhoff v. Egelhoff,* 532 U.S. 141 (2001), application of the minority approach would result in the perversity of a plan administrator having to give benefits to a named beneficiary who murdered the participant. *Egelhoff* at 159-160.

The Fifth Circuit's opinion undermines this Court's determination, as expressed in *Firestone Tire & Rubber Co.,* 489 U.S. at 110, that federal courts have the power to shape federal common law in response to the needs of a particular case. The Fifth Circuit should have applied the Seventh Circuit's federal common law approach in *Fox Valley* to further the authority this Court granted to create and apply substantive law to issues not explicitly regulated by ERISA. *See* Jeffrey A. Brauch, *The Federal Common Law of ERISA,* 21 HARV. J.L. & PUB. POL'Y 541, 549 (1998).

The Fifth Circuit erred when it failed to consider ERISA Section 1104 as a whole and elevated a secondary concern, the convenience of plan administrators, over ERISA's prime directive to protect the interests of participants and beneficiaries. ERISA Section

1104(a)(1) imposes a fiduciary standard on the plan administrator, requiring him to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." *See, e.g.,* 29 U.S.C. § 1104(a)(1). The August 15, 2007 panel should have adhered to its *Guardian Life, Brandon,* and *Stobnicki* rulings rather than follow the Third Circuit into *McGowan's* quagmire of confusion. The Federal Common Law courts reasonably recognize that *ERISA does not address waiver by a beneficiary.*

The Fifth Circuit's departure from past precedent raises the prospect of awarding windfalls to murderers who slay their own spouses. Under the typical state slayer-statute, for example, a murderer relinquishes all right to receive any of the participant's property or other benefits. This reflects the sound reasoning that those who kill loved ones should not profit by their wrong-doing. As the Texas Supreme Court observed in its analysis of the interaction of ERISA pension law and divorce-decree waivers in *Keen v. Weaver,* 121 S.W.3d 721 (Tex. 2003), "at least one other court following *Egelhoff* has also held that a murderer should not be permitted to receive benefits from a victim's plan, either under a slayer statute or under federal common law." *Keen*, 121 S.W.3d at 726 n.4, citing *Admin. Comm. for the H.E.B. Inv. and Ret. Plan v. Harris,* 217 F.Supp.2d 759, 761-62 (E.D. Tex. 2002).

But, under either the minority Plan Documents dogma or the zero-tolerance Fifth Circuit "QDRO is the *only* waiver" test, he who slays his spouse or his

parents can still pocket the pension payments, for the statute that denies those benefits to the murderous beneficiary would constitute an unlawful "assignment or alienation" (or "a direct *or indirect arrangement*") prohibited by ERISA's anti-alienation provision. *Cf. Rhoades v. Casey*, 196 F.3d 592 (5th Cir. 1999). The flexible Federal Common Law approach, which uses and enforces the experience of common law courts acquired over centuries of jurisprudence, avoids such absurd and irrational outcomes by interpreting pension plan documents and anti-alienation provisions in a more reasonable and less stringent manner.

The Fifth Circuit's August 15, 2007 analysis conflicts with other circuits' and state supreme court holdings on the interaction of federal common law in ERISA cases. Not only has the Fifth Circuit "entered a decision in conflict with the decision of another United States court of appeals" under SUP. CT. R. 10(A), it has also issued an opinion in conflict with its own ERISA precedent.

D. The Fifth Circuit's opinion conflicts with IRS General Counsel Memorandum 39,858's policy of recognizing that post-death disclaimers of ERISA benefits do not constitute prohibited assignments or alienations.

The August 15, 2007 Opinion has the potential to create mischief not only within the circuit but on a nationwide level because it directly conflicts with the policy of the Internal Revenue Service, as reflected in

its GENERAL COUNSEL MEMORANDUM 39,858, 1991 WL 776304 (Sept. 23, 1991) (the "IRS GCM"). It states that disclaimers by named beneficiaries of ERISA pension plans after the participant's death do *not* violate ERISA's anti-alienation provision. I.R.S. GEN. COUNS. MEM. 39,858.

If it remains un-reversed, the August 15, 2007 Opinion will prevent surviving ex-spouses from disclaiming ERISA retirement benefits. GCM 39,858 concludes that "a disclaimer of benefits under a qualified plan does not constitute a prohibited 'assignment or alienation' of plan benefits" under ERISA. *See* I.R.S. GCM 39,858. It notes that numerous areas of the law, including the Bankruptcy Code, the Uniform Probate Code, and trust law, recognize that waivers and disclaimers are not "transfers," and that it finds "no evidence that Congress intended to preclude a spouse from disclaiming or renouncing benefits under a qualified plan payable after the participant's death." *Id.* But the Fifth Circuit has reached the opposite conclusion that will undermine the IRS policy in Texas, Louisiana, and Mississippi.

In explaining this decision, the Fifth Circuit defined an "assignment or alienation" as "[a]ny direct *or indirect arrangement* . . . whereby a party acquires from a participant *or beneficiary* a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant *or beneficiary*." APP. 1 at 8, citing 26 C.F.R. § 1.401(a)-13(c)(1)(ii). Under this rationale, an ex-spouse's voluntary disclaimer of a

participant's ERISA benefits under Section 2518 of the Internal Revenue Code would violate ERISA's anti-alienation provisions since a disclaimer would be an unlawful, "indirect arrangement" through which someone else gains an interest enforceable against a pension plan. The opinion thus infringes on freedom of contract.

The August 15, 2007 ruling will thus compel surviving spouses to accept pension benefits they might not need and may not want – in cases where such an inflexible and unnecessary rule could adversely impact other benefits individuals receive under law, contract, or public assistance. A surviving spouse might want to disclaim certain plan benefits to avoid creating a taxable estate at death or to continue to receive governmental benefits. As one commentator notes: "What is a plan to do: sneak by the beneficiary's house at night, jimmy open a window, and pour the cash into the bedroom?" Comment, *Who Is the Payee, Part VIII: Altobelli v. IBM and the Other Beneficiary Waiver Cases,* 14 ERISA LITIG. REPTR. 16 (Aug. 1996).

E. The new opinion conflicts with the Texas Supreme Court's 2003 *Keen v. Weaver* decision, creating a federal versus state of Texas shootout leading to forum-shopping, sharp practice, and courtroom chaos.

The August 15, 2007 Opinion conflicts materially with the Texas Supreme Court's reasoning and ruling

in *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003), where the Texas Supreme Court enforced a divorce-decree waiver in strikingly similar circumstances. A 5-4 majority decided the *Keen* case, exemplifying the utter lack of consensus in ERISA divorce-decree waiver jurisprudence as much as the 3-way split in the *McGowan* panel decision this Court considered for certiorari last year.

A similar fact scenario led the Nebraska Supreme Court to rule in favor of a late plan-participant's estate and against his ex-spouse in *Strong v. Omaha Construction Industry Pension Plan*, 701 N.W.2d 320, 327-31 (Neb. 2005) (*per curiam*). The dissent in the Nebraska Supreme Court, like the dissent in the Texas Supreme Court, reflects the need for a writ of certiorari in this important field of law.

The Texas Supreme Court's *Keen* majority opinion showed a better appreciation for the intricacies of the ERISA statutory scheme and the existence of statutory and common law waiver within that scheme in its analysis of a similar divorce-decree dispute:

> While Patsy [Keen]'s interpretation is simple and easy to apply, *we do not believe that ERISA's text prohibits a plan administrator from recognizing a beneficiary's waiver, disclaimer, or other repudiation of plan benefits*. First, other provisions of ERISA require plan administrators to look beyond beneficiary designations in plan documents to determine entitlement to plan benefits. For

> example, while ERISA generally prohibits a participant's assignment or alienation of pension benefits, since 1984 ERISA has provided a limited exception if the benefits are the subject of a qualified domestic relations order (QDRO). *See* 29 U.S.C. § 1056(d)(3)(A). A plan administrator presented with a QDRO that satisfies ERISA's fairly detailed requirements must pay an alternate payee designated in the QDRO rather than the beneficiary designated in plan documents. *Boggs v. Boggs,* 520 U.S. 833, 846-47 . . . (1997). And a spouse who is a designated beneficiary of a joint and survivor annuity may waive entitlement to those benefits under certain circumstances. 29 U.S.C. § 1055(c)(1)(A). Furthermore, the Supreme Court has recognized that ERISA welfare plan benefits may be garnished under state procedures. *See Mackey v. Lanier Collection Agency & Serv. Inc.,* 486 U.S. 825, 841 . . . (1988).

Keen, 121 S.W.3d at 724-25 (emphasis supplied). The Kennedy Estate commends this analysis of waiver law, which exemplifies the rationale of other courts using the majority Federal Common Law analysis.

The Kennedy Estate pointed out the Texas Supreme Court's *Keen v. Weaver* ruling on pages 11, 14, and 28 of its Appellee's Brief, thus making the Fifth Circuit aware that any abandonment of its prior federal common law waiver precedent could open a gaping chasm between ERISA law in Texas state courts and ERISA law in Texas' four federal district

courts. This Fifth Circuit panel plowed ahead anyway, heedless of the chaos its actions are bound to cause businesses, individuals, courts, and plan administrators in the Lone Star State.

The Texas Supreme Court's *Keen* opinion noted that "Section 9.302 of the Texas Family Code, known as the 'redesignation statute,' provides that the designation of a spouse as a retirement account beneficiary is rendered ineffective by a subsequent divorce." *Id.*, 121 S.W.3d at 723. The Majority further observed that, "If the statute applied here, it would operate to award Rita's estate the plan proceeds as the alternate beneficiary." Yet the court held, properly, that ERISA pre-empted the re-designation statute. *Id.*

The state re-designation statute that the Texas Supreme Court considered typifies similar statutes from all across the country that reflect the accumulated experience of the states that people who designate their spouses as beneficiaries of insurance policies, pension plans, and other investments typically leave those persons as named beneficiaries after divorces only because they forget to change those policies or because they believe that courts will enforce freely-negotiated, voluntarily-signed divorce-decree property settlements. The Fifth Circuit's August 15, 2007 opinion flies in the face of that common sense experience and legislative wisdom.

As a result of this unnecessary state versus federal conflict, an attorney, plan-administrator, or

judge in Texas will not be able to predict the outcome of an ERISA pension plan dispute regarding waiver in a divorce decree.

The first foreseeable result of this new federal versus state conflict is forum-shopping. Savvy Texas trial lawyers are certain to file declaratory judgment actions and interpleader suits in federal court if they want to supersede or negate voluntary divorce-decree waivers. Equally canny advocates are sure to file similar actions in state courts if they want to enforce freely-negotiated divorce court property settlement agreements. Clever clients represented by unscrupulous counsel may even execute divorce court waivers of pension plan proceeds with the intent to negate those agreements by filing federal court declaratory judgment actions, all for the purpose of using the Fifth Circuit's new *gotcha* clause to renegotiate their divorces salami-style, one slice of property at a time.

It takes little imagination to foresee the courtroom chaos that will ensue as spouses, family law attorneys, and trial judges try to disentangle Texas law. Should they follow the Texas Supreme Court's 2003 pro-waiver, Federal Common Law ruling, or adhere to the Fifth Circuit's anti-waiver, "QDRO is the *only* waiver" holding? And what of ERISA pension plan administrators in Texas? How will they make their fiduciary decisions? The Fifth Circuit's August 15, 2007 opinion augurs an era of uncertainty in negotiating, interpreting, and enforcing divorce-court property settlement agreements in Texas. This Court

holds a federal solution to this seventeen-year-old federal problem: a writ of *certiorari*.

F. The new opinion conflicts with prior Fifth Circuit precedent, maximizing the prospects for intra-circuit confusion.

The August 15, 2007 Opinion conflicts with the Fifth Circuit's prior precedent by carving out an exception for ex-spouse cases involving QDROs. Citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), APP. 1 at 5, the panel reversed the summary judgment and stated that "[t]hose cases are inapposite" because they "concerned ERISA-governed life-insurance policies, which are "welfare plan[s]," as defined by 29 U.S.C. § 1002(1), holding that "ERISA's anti-alienation provision was *not* at issue."

The August 15, 2007 decision is at odds with the reasoning of previous Fifth Circuit cases concerning divorce-decree waivers where the circuit upheld divorce-decree waivers of a beneficiary's right to receive pension proceeds payable under an ERISA plan. *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1322-24 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995) (a decedent's ex-wife and the beneficiary of an ERISA life-insurance plan, waived them through a divorce decree).

The Fifth Circuit's novel, split-the-difference opinion abandons *Brandon*, 18 F.3d at 598 and *Rhoades v. Casey*, 196 F.3d 592, 598 (5th Cir. 1999),

where the circuit held that ERISA's "anti-alienation provision is not absolute." This shift in law will increase uncertainty among participants and beneficiaries and lead to more litigation extraordinarily expensive for heirs and estates.

Similarly, in *McGowan v. NJR Service Corp.*, the Third Circuit erred when it held that a beneficiary had not effectively waived her rights to her ex-husband's pension plan. In that strikingly similar decision, the Third Circuit opted not to recognize that ERISA's overriding policy objective is to protect participants and their beneficiaries. It further failed to consider the legislative history of ERISA and the development of the QJSA, which should have persuaded the court to apply the federal common law approach.

Here, as the Third Circuit did in *McGowan*, the Fifth Circuit has not only misinterpreted the ERISA statute, but also conferred an undeserved windfall on an ex-spouse to the detriment of a participant's estate. Rather than carrying out the fiduciary duties under ERISA by filing an interpleader or declaratory judgment action to determine the rightful recipients of the late William P. Kennedy's SIP account, the DuPont administrator – actually, a paralegal in his employ – did the *easy* but wrong thing, even after being placed on notice of the contending claims to the SIP proceeds. The August 15, 2007 panel ignored the plan administrator's fiduciary duties and focused, erroneously, on that administrator's convenience.

The resemblance of ERISA to the common law of trusts, the structure of the statute, and ERISA's silence on the issue of waiver should have led the court to determine that the federal common law approach applied. Instead, the court neglected to observe the common law and followed the minority approach.

Additionally, the Fifth Circuit erred in setting forth the policy grounds and case law it relied upon in denying the Estate Decedent Kennedy's SIP benefits. The Fifth Circuit should have recognized that this case differed from courts such as the Third Circuit which have traditionally followed the minority approach and that the facts here warranted the traditional common law approach. If the Fifth Circuit had applied the common law approach, the Estate would have received the SIP benefits that Decedent Kennedy would have reasonably expected his survivors and creditors to receive.

The District Court correctly interpreted ERISA and Federal Common Law when it entered a judgment in favor of the Estate for the amount of the SIP pension benefits DuPont erroneously paid to Ex-Wife Liv Kennedy rather than the Estate.

III. The Fifth Circuit erred in applying a plan-deferential five-factor abuse of discretion test for awarding attorney's fees that penalizes prevailing parties in ERISA cases – an issue of first impression for this Court.

This Court has never specified the standard governing the award of ERISA attorney's fees under 29 U.S.C. § 1132(g)(1). That law states that "[i]n any action . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The legislative history is sparse. *See* H.R. CONF. REP. NO. 93-1280 (1973), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107; H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 2659. Courts lament the absence of legislative and Supreme Court guidance when awarding ERISA fees. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991).

A. The five-factor test.

Confronted with a standard-less statute, circuit courts have created tests in ERISA fee decisions, including the five-factor test applied below, which focuses on (1) culpability or bad faith; (2) ability to pay; (3) deterrent effect; (4) benefit to all plan-participants and beneficiaries; and (5) merits of party positions. APP. 1 at 11-14 (citing *Dial v. NFL Player Supplemental Disability Plan,* 174 F.3d 606, 613 (5th Cir. 1999)). That test began in *Eaves v. Penn,* 587 F.2d 453, 465 (10th Cir. 1978), when the Tenth Circuit

listed five factors to be considered in attorney's fee decisions – a test criticized as one "without citation and apparently from thin air." David E. Gordon & Robert N. Eccles, *ERISA Attorney's Fees: An Unpredictable Situation,* 10 INSIDE LITIG. 17, 17 (1992).

B. The circuit split.

The First, Second, Third, Fifth, Sixth, and Tenth Circuits nevertheless apply the *Eaves* test. *See* Jessica Michelle Westbrook, *Resolving the Dispute over When Attorney's Fees Should Be Awarded under ERISA in Two Words: Plaintiff Prevails,* 53 ALA. L. REV. 1311, 1314-15 (Summer 2002).

In *Bittner v. Sadoff & Rudoy Industries, Inc.,* 728 F.2d 820 (7th Cir. 1984), Judge Posner noted but did not apply the five-factor test, but instead looked to the Equal Access to Justice Act for guidance about the word "discretion" in a manner that weighed review of discretion in favor of a prevailing party. *Id.* at 826-830.

In marked contrast, the Eighth Circuit in *Landro v. Glendinning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980) and the Ninth Circuit in *Smith v. CMTA-IAM Pension Trust,* 746 F.2d 587, 590 (9th Cir. 1984) have incorporated the logic of the Fees Award Act, 45 U.S.C. § 1988, into their review of ERISA fee awards, reasoning that a prevailing plan beneficiary "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

C. A just solution to the circuit split consistent with ERISA's goals.

This Court should adopt the Eighth and Ninth Circuits' Attorney Fee Act analysis under 28 U.S.C. § 1988 in Civil Rights Act cases, where this Court has ruled that prevailing plaintiffs are ordinarily entitled to recover their attorney's fees unless some extraordinary circumstances make a fee award unjust. *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983).

The *Eckerhart* standard is more consistent with ERISA's purposes than the defendant-deferential, five-factor test here. *Tingey v. Pixley-Richards West, Inc.*, 958 F.2d 908, 909 (9th Cir. 1992); John H. Fanning, *The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefits Cases,* 41 CATHOLIC U. L. REV. 871 (Summer 2002); Westbrook, 53 ALA. L. REV. at 1320-26.

In furtherance of ERISA's primary objective of protecting participants and beneficiaries, the Estate should recover the fees DuPont has already forced the Estate to incur, and the money DuPont will subsequently cause the Estate to expend on appeal. ERISA is remedial legislation enacted primarily to promote the interests of employees and their beneficiaries, and not to serve as a shield for plan-managers' incompetence.

In this case, DuPont could have easily protected its own interests and ensured that the late William P. Kennedy's SIP proceeds went to the rightful owner

simply by depositing those proceeds into the registry of a court in a run-of-the-mill interpleader action.

Otherwise, the failure to reimburse reasonable and necessary fees will substantially reduce participant-heir's recovery and encourage costly, unreasonable defenses of corporate error, where plans use their superior financial resources to wage successful wars of attrition against under-funded opponents. *See, e.g., Salovaara v. Eckert*, 222 F.3d 19, 28 (2nd Cir. 2000); *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128 (7th Cir. 1991).

In short, a failure to award attorney's fees to prevailing plaintiffs representing pension plan participants, their heirs, and their beneficiaries undermines ERISA's primary purpose, as analyzed above, of protecting those very parties.

Another reason to shift over to a Section 1988 model of fee awards is to encourage attorneys to represent participants, their heirs, and their beneficiaries in the extraordinarily intricate and remarkably risky world of ERISA litigation, where the benefits recovered are modest and the payout often protracted. *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1302 (6th Cir. 1991) (where amici curiae parties urged the court to adopt a "private attorney general" theory of fee shifting because employees have great difficulty finding attorneys willing to handle these cases).

ERISA's attorney's fees statute should be liberally construed to further the statute's remedial purpose, as

in *Chambliss v. Masters, Mates, & Pilots Pension Plan*, 8[illegible] F.2d 869, 872 (2nd Cir. 1999) and *McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1172 (9th Cir. 1999), rather than in a fashion that punishes prevailing heirs of participants.

Accordingly, this Court should grant a writ of *certiorari* to correct the error below, resolve the conflict among the circuits and state supreme courts, and establish a just, uniform, federal common law rule of decision for these recurring and important ERISA issues, including the unresolved issue of the proper interrelationship of ERISA and federal common law.

CONCLUSION

Petitioner Kari Ellen Kennedy, Independent Executrix of the Estate of William Patrick Kennedy, Deceased, requests this Court to GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and order full briefing on the merits.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-41851

KARI ELLEN KENNEDY, Independent Executrix of The Estate of William Patrick Kennedy, Deceased,

Plaintiff-Appellee-Cross-Appellant,

versus

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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(Filed Aug. 15, 2007)

Before GARWOOD, BARKSDALE and GARZA, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

The issues raised by each side are governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (ERISA). The Plan Administrator for DuPont Savings and Investment Plan and E.I. DuPont de Nemours & Co. (DuPont) contests the summary judgment awarded the estate of William Patrick Kennedy for benefits under a retirement

plan. The Estate challenges the denial of attorney's fees. **VACATED AND RENDERED IN PART; AFFIRMED IN PART.**

I.

Decedent was a DuPont employee and participant in its savings and investment plan (SIP). The SIP is an "employee pension benefit plan", as defined by ERISA. 29 U.S.C. § 1002(2). Pursuant to ERISA, the SIP provided, *inter alia:* "no assignment of the rights or interests of account holders under this Plan will be permitted or recognized". *See* 29 U.S.C. § 1056(d)(1) (requiring that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated") (anti-alienation provision).

In 1971, during his DuPont employment, decedent married Liv Kennedy. Decedent signed a beneficiary-designation form in 1974, identifying Liv Kennedy as the SIP's sole beneficiary. No contingent SIP beneficiaries were named.

Decedent and Liv Kennedy divorced in 1994. Pursuant to the decree, Liv Kennedy agreed to be divested of "all right, title, interest, and claim in and to . . . the proceeds there from, and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [decedent's] employment". In 1997, an ERISA Qualified Domestic Relations Order (QDRO), pursuant to 29 U.S.C. § 1056(d)(3)(B)(i), was approved. It provided

benefit-disbursement instructions for some of decedent's non-SIP employee-benefit plans. No QDRO for the SIP, however, was ever submitted.

Decedent retired from DuPont in 1998 and died in 2001. He never executed any documents replacing or removing Liv Kennedy as the SIP beneficiary.

Kari Kennedy, the daughter of decedent and Liv Kennedy, was appointed executrix of decedent's estate. By letter to DuPont, Kari Kennedy (the Estate) demanded the SIP funds be distributed to the estate, claiming Liv Kennedy's beneficiary designation was invalid pursuant to Texas Family Code § 9.302 (providing, with certain exceptions, a spouse's designation as a retirement-plan beneficiary is invalidated by a subsequent divorce). DuPont refused, relying on the above-described SIP beneficiary-designation. The Estate also requested Liv Kennedy to relinquish her SIP interest. She did not do so; instead, pursuant to requests to DuPont, she collected the SIP balance (approximately $400,000).

Seeking to recover the SIP benefits, the Estate filed this action, presenting an ERISA claim, under 29 U.S.C. § 1132(a)(1)(B), and a state-law breach-of-contract claim. The Estate claimed: Liv Kennedy waived her rights to the SIP benefits through the divorce decree, thus invalidating the SIP beneficiary-designation; and, accordingly, DuPont incorrectly distributed the SIP benefits. (DuPont filed a third-party claim against Liv Kennedy, asserting that, in the event she was not the correct beneficiary, it was

entitled to return of the SIP benefits. This claim was settled.)

Following discovery, the parties filed cross-motions for summary judgment. The district court, *inter alia,* granted summary judgment for the Estate on its ERISA claim, holding it was entitled to the value of the SIP benefits existing at the time of decedent's death, and for DuPont on the Estate's breach-of-contract claim, holding it was preempted by ERISA.

In awarding summary judgment to the Estate, the district court concluded, *inter alia:* federal common law applied to determine whether Liv Kennedy's executing the divorce decree waived her right to the SIP benefits; and, as a matter of law, that decree constituted a valid waiver.

DuPont's subsequent motion for judgment as a matter of law or, alternatively, a new trial, was denied. Also denied was the Estate's ERISA-based motion for attorney's fees.

II.

At issue, under ERISA, are: did Liv Kennedy's divorce decree constitute a waiver of her rights as an SIP beneficiary; and were attorney's fees correctly denied to the Estate? (The Estate does not contest the adverse summary judgment on its state-law claim.)

A.

A summary judgment is reviewed *de novo*, applying the same standards as the district court. *E.g.*, ***Keelan v. Majesco Software, Inc.***, 407 F.3d 332, 338 (5th Cir. 2005). Such judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law". FED.R.CIV.P. 56(c); *see, e.g.*, ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986). Where, as here, an ERISA plan administrator's benefits decision is nondiscretionary, that decision is reviewed *de novo*. *See* ***Brandon v. Travelers Ins. Co.***, 18 F.3d 1321, 1324 (5th Cir.1994).

1.

In granting summary judgment to the Estate, the district court relied on a series of cases from our court holding: when ERISA preempts state law, federal common law applies to determine whether the named beneficiary for an ERISA plan has waived his rights (federal-common-law waiver approach); and the waiver is valid if it is explicit, voluntary, and made in good faith. *See* ***Guardian Life Ins. Co. of Am. v. Finch***, 395 F.3d 238, 240-41, 243 (5th Cir. 2004); ***Manning v. Hayes***, 212 F.3d 866, 874 (5th Cir. 2000); ***Clift v. Clift***, 210 F.3d 268, 270-72 (5th Cir. 2000); ***Brandon***, 18 F.3d at 1326-27. Several of these cases concerned whether a divorce decree constituted a waiver of a beneficiary's right to proceeds under an ERISA plan. *See, e.g.*, ***Brandon***, 18 F.3d at 1322-24 (holding a decedent's ex-wife, who was the named

beneficiary of an ERISA-governed life-insurance plan, was not entitled to the proceeds of the plan because she waived them through a divorce decree). The Estate asserts these cases control, dictating application of the federal-common-law waiver approach.

These cases are inapposite, however; they concerned ERISA-governed life-insurance policies, which are "welfare plan[s]", as defined by ERISA. 29 U.S.C. § 1002(1) (defining "welfare plan" as one providing "medical . . . benefits, or benefits in the event of sickness, accident, disability, death or unemployment" for plan participants or their beneficiaries "through the purchase of insurance or otherwise"); *see also* ***Brandon***, 18 F.3d at 1324 (characterizing employer-provided life-insurance policy as "welfare plan"). Accordingly, ERISA's anti-alienation provision was *not* at issue. As quoted *supra*, that provision expressly applies *not* to "welfare plan[s]", but to ERISA "pension plan[s]", as defined in 29 U.S.C. § 1002(2)(A) (defining "pension plan" as one that "provides retirement income to", or "results in a deferral of income by", employees). *See, e.g.*, ***Mackey v. Lanier Collection Agency & Serv., Inc.***, 486 U.S. 825, 836-37 (1988); ***Brandon***, 18 F.3d at 1324 (noting that anti-alienation provision "applies only to pension plans"). "According to the Supreme Court, the absence of . . . anti-alienation protection with respect to ERISA welfare . . . plans must mean . . . the benefits of those plans are freely alienable." ***Tango Transp. v. Healthcare Fin. Servs. LLC***, 322 F.3d 888, 893 (5th Cir. 2003) (citing ***Mackey***, 486 U.S. at 837).

The SIP's being an ERISA "pension plan", the anti-alienation provision applies. Because ERISA preempts state law for the issue at hand, *e.g.*, ***Brandon***, 18 F.3d at 1325, the relevant inquiry is whether, in the light of the anti-alienation provision, "the federal law governing the resolution of [this action] may be reasonably drawn from the text of ERISA itself, or must instead be developed as a matter of federal common law". ***Manning***, 212 F.3d at 870.

For the following reasons, contrary to the district court, the anti-alienation provision controls. Accordingly, the federal-common-law waiver approach is not applicable.

2.

The SIP complied with ERISA's earlier-quoted anti-alienation provision, which states: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated". 29 U.S.C. § 1056(d)(1). The Estate contends, erroneously, that "waiver" differs from "assignment" or "alienation" and, therefore, a beneficiary's waiver is *not* prohibited by the anti-alienation provision. *See* ***Estate of Altobelli v. Int'l Bus. Machs. Corp.***, 77 F.3d 78, 81 (4th Cir. 1996) ("the anti-alienation clause does not apply to a beneficiary's waiver"); ***Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown***, 897 F.2d 275, 279 (7th Cir. 1990) (en banc) (anti-alienation provision "focus[es] on the *assignment or alienation* of benefits by a participant, *not* the *waiver of a right to*

payment of benefits made by a designated beneficiary" (emphases added)).

An "assignment or alienation" is defined by regulation as

> [a]ny direct *or indirect arrangement* . . . whereby a party acquires from a participant *or beneficiary* a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant *or beneficiary.*

26 C.F.R. § 1.401(a)-13(c)(1)(ii) (emphases added). ***McGowan v. NJR Service Corp.***, 423 F.3d 241 (3rd Cir. 2005), *cert. denied,* 127 S.Ct. 1118 (2007), relied on that regulation to hold a beneficiary's waiver of her rights to a surviving spouse's annuity, pursuant to a marital-settlement agreement and in favor of another spouse, fell under the anti-alienation clause as an "indirect arrangement". ***Id.*** at 248-53; *see also* ***Boggs v. Boggs***, 520 U.S. 833, 851-52 (1997) (relying on regulation to hold a testamentary transfer, *by a plan beneficiary,* of an interest in her former husband's undistributed pension plan constituted an "assignment or alienation" because, "[i]f . . . claim[ants] were allowed to succeed[,] they would have acquired . . . an interest in [participant's] pension plan at the expense of plan participants and beneficiaries").

Similarly, Liv Kennedy's divorce-decree "waiver" constitutes an "indirect arrangement", by which the

Estate gains an "interest enforceable against the plan" and, therefore, falls under ERISA's anti-alienation provision. *See* ***McGowan***, 423 F.3d at 248-53; *see also* ***Fox Valley***, 897 F.2d at 282-83 ("Waiver [in the ERISA context] is an anticipatory gift, to whoever is next in line under the Fund's rules.") (Easterbrook, J., dissenting).

The Estate maintains this ruling is proscribed by ***Rhoades v. Casey***, 196 F.3d 592, 598 (5th Cir. 1999) (applying, in the pension-plan context, an "exception to ERISA's anti-alienation provision for a knowing and voluntary waiver of retirement benefits that is executed to reach a settlement"), and ***Stobnicki v. Textron, Inc.***, 868 F.2d 1460, 1465 (5th Cir. 1989) (holding that "a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an assignment made pursuant to a bona fide settlement of such a controversy is not invalidated by the anti-alienation provision"). We disagree.

Unlike the instant action, neither ***Rhoades*** nor ***Stobnicki*** involved a divorce decree. ***Rhoades***, 196 F.3d at 594-95; ***Stobnicki***, 868 F.2d at 1461. Accordingly, unlike here, neither involved ERISA's QDRO provisions, *see* 29 U.S.C. § 1056(d), which provide significant support for our deciding the anti-alienation provision controls.

In the marital-dissolution context, the QDRO provisions supply the *sole* exception to the anti-alienation provision; they exempt a state

domestic-relations order determined to be a QDRO, under the standards set forth in ERISA. 29 U.S.C. § 1056(d)(3)(A) (anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, *except that . . . [it] shall not apply if the order is determined to be a [QDRO]*" (emphasis added)).

To qualify as a QDRO, a divorce decree must "clearly specif[y]" the identity of any beneficiary, the particular plans affected, and the exact manner of calculating benefits. 29 U.S.C. § 1056(d)(3)(C). "The requirement of clear specification is designed to spare the plan administrator from litigation-fomenting ambiguities as to who the beneficiaries designated by the divorce decree are." ***Metro. Life Ins. Co. v. Wheaton***, 42 F.3d 1080, 1084 (7th Cir. 1994). If the state domestic-relations order qualifies as a QDRO, the plan must pay benefits "in accordance with [its] applicable requirements". 29 U.S.C. § 1056(d)(3)(A).

In ***Boggs***, the Supreme Court noted the care with which Congress created the QDRO mechanism in order "to give enhanced protection to the spouse and dependent children in the event of divorce or separation", 520 U.S. at 847, and emphasized that the QDRO exception, one of only two to the anti-alienation provision, is "not subject to judicial expansion", ***id.*** at 851. ***Boggs*** further stated: "The axis around which ERISA's protections revolve is the concepts of participant and beneficiary. When Congress has chosen to depart from this framework, it

has done so in a careful and limited manner". ***Id.*** at 854.

The federal-common-law waiver approach is in tension, to say the least, with the detailed, careful, and comprehensive QDRO scheme created by ERISA. "In other words, the QDRO provision, which recognizes the right to designate alternate payees under certain circumstances, 'give[s] rise to the strong implication that' the designation of alternate payees under other circumstances (i.e. through waivers) is 'not consistent with the statutory scheme'". ***McGowan***, 423 F.3d at 250 (quoting ***Boggs***, 520 U.S. at 847).

As noted, a QDRO for the SIP was never submitted to DuPont. When, as here, ERISA provides a specific mechanism – the QDRO – for addressing the elimination of a spouse's interest in plan benefits, but that mechanism is *not* invoked, there is no basis to formulate a federal-common-law rule. Requiring DuPont to recognize the waiver in this situation would conflict with ERISA by purporting to determine rights to pension-plan benefits in a manner not authorized by the QDRO provisions, 29 U.S.C. § 1056(d)(3), and, therefore, not permitted by the anti-alienation provision, 29 U.S.C. § 1056(d)(1).

B.

The Estate contests the district court's not awarding its attorney's fees pursuant to 29 U.S.C. § 1132(g)(1) ("In any action under this subchapter . . .

by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."). Our vacating the judgment awarded the Estate is not dispositive *per se* for this issue, this court having held "a party need not prevail in order to be eligible for an award of attorney['s] fees under § 1132(g)(1) of ERISA". ***Gibbs v. Gibbs***, 210 F.3d 491, 503 (5th Cir. 2000).

The fees-denial is reviewed for abuse of discretion. *See* ***Dial v. NFL Player Supplemental Disability Plan***, 174 F.3d 606, 613 (5th Cir. 1999). Along that line, in deciding whether to award fees, a district court applies the test stated in ***Iron Workers Local No. 272 v. Bowen***, 624 F.2d 1255 (5th Cir. 1980), which examines the following factors (***Bowen*** factors): (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award; (3) whether an award would deter others acting under similar circumstances; (4) whether the requesting party sought to benefit all participants and beneficiaries of an ERISA plan, or to resolve a significant question regarding ERISA; and (5) the relative merits of the parties' positions. ***Id.*** at 1266. The district court considered the ***Bowen*** factors and concluded, *inter alia,* only the second and fifth factors weighed in the Estate's favor. For the following reasons, it did *not* abuse its discretion in denying fees.

For the first ***Bowen*** factor, the Estate contends Dupont exhibited culpability by, *inter alia:* failing to interplead the SIP funds upon being notified of the

Estate's demand; and delegating the demand's denial to a person engaged in the unauthorized practice of law.

Regarding its unauthorized-practice-of-law contention, the Estate relies solely on a letter from a legal assistant, conveying DuPont's rejection of the Estate's demand. That letter, however, states: "*We* continue to be of the opinion that the [SIP] proceeds . . . are payable to the named beneficiary". (Emphasis added.) Because the Estate points to *no* additional record evidence suggesting the legal assistant *alone* made the denial decision, this contention fails.

Arguably, DuPont, having been put on notice that Liv Kennedy's status as beneficiary was contested, should have interpleaded the SIP funds. In any event, its actions do not show culpability. Notably, there is no record evidence of the Estate's requesting interpleader. Further, DuPont's benefits decision was *not* inconsistent with our court's precedent, which, as discussed *supra*, had *not* examined divorce-decree waivers in the ERISA pension-plan context. Moreover, DuPont had no financial incentive to distribute the SIP benefits to Liv Kennedy instead of the Estate. *See* ***Dial***, 174 F.3d at 614 (imputation of bad faith unreasonable where, *inter alia*, benefits decision "did not save the [plan] any money").

For the third ***Bowen*** factor, there being insufficient culpability or bad faith by DuPont, the deterrent effect of an award of attorney's fees is less applicable. *See* ***Harms v. Cavenham Forest Indus.***,

Inc., 984 F.2d 686, 694 n. 12 (5th Cir. 1993) ("Given the lack of any bad faith or culpability in . . . this case, we find the deterrent purpose that the third ***Bowen*** factor purports to serve to be inapplicable to our analysis."). Moreover, it is questionable whether such award would have a deterrent effect in these circumstances, where DuPont's benefits decision was *not* inconsistent with relevant precedent, and, in fact, has been upheld on this appeal. *See* ***Dial***, 174 F.3d at 614 (no deterrent effect where plan administrators "merely chose to interpret an outside document in the way they found correct").

Concomitantly, for the fifth ***Bowen*** factor, our vacating the judgment renders inaccurate the district court's concluding the Estate presented a more meritorious case. We need not examine the two remaining ***Bowen*** factors.

III.

For the foregoing reasons, the judgment for the Estate is **VACATED**; judgment is **RENDERED** for DuPont; and the fees-denial is **AFFIRMED**.

VACATED AND RENDERED IN PART; AFFIRMED IN PART.

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KARI ELLEN KENNEDY,	§	
INDEPENDENT	§	
EXECUTRIX OF THE	§	
ESTATE OF WILLIAM	§	
PATRICK KENNEDY,	§	
Deceased,	§	**Civil Action Number**
Plaintiff,	§	**1:01-CV-904**
	§	
v.	§	
E.I. DUPONT DE	§	
NEMOURS & CO., et al,	§	
Defendants.	§	

FINAL JUDGMENT

(Filed Oct. 05, 2005)

The Court, having considered the issues presented in this civil action and granted summary judgment, hereby **ORDERS, ADJUDGES** and **DECREES** that this cause is dismissed with prejudice and judgment is entered as follows:

The Court, having jurisdiction over this matter under 28 U.S.C. § 1331 and 29 U.S.C. §§ 1001 *et seq.*, enters a final and appealable judgment on the merits for the reasons fully set out in this court's *Order on Motion for Summary Judgment* [Clerk's doc. # 61] entered on March 3, 2005.

The Court further finds that prejudgment interest is governed by Texas law; Texas law provides for prejudgment interest at the current rate of 6.25% per annum, simple interests.

It is further **ORDERED**, as fully discussed and previously ordered by this court's *Order on Motions for Summary Judgment,* that Plaintiff have and recover from Defendant E.I. DuPont de Nemours and Company and Plan Administrator for DuPont Savings and Investment Plan, jointly and severally, the amount of $402,152.56 (Amount 1), plus prejudgment interest at the rate of six and one quarter percent (6.25%) simple interest on such amount from October 24, 2001, through the day before entry of this final judgment (Amount 2), with post-judgment interest on Amounts 1 and 2 thereon, from the date of judgment until paid at the federal judgment rate; and

It is **ORDERED** that Defendant E.I. DuPont de Nemours and Company and Plan Administrator for DuPont Savings and Investment Plan take nothing on their claims against Plaintiff Kari Ellen Kennedy; and

It is further **ORDERED** that the *Motion for Entry of Agreed Judgment as to Third Party Claims Against Liv Kennedy* [Clerk's doc. #71] is **GRANTED**; and,

Based on the agreement of the parties, the funds dispersed from the DuPont Savings and Investment Plan Account of William Patrick Kennedy to third party Defendant Liv Kennedy by E.I. DuPont de

Nemours and Company and Plan Administrator for DuPont Savings and Investment Plan, in the event that they (or property traceable to such funds) are recovered, returned, repaid or recouped in any way from Magne Olav Hansen, Olav Ostnes, Roger Kerr, and Dorvil Kerr; Liv Kennedy shall within ten (10) business days pay all of those funds over to E.I. DuPont de Nemours and Company at the attention of Lori Knauer or her successor in the DuPont Legal Department, 1007 Market Street, Wilmington, Delaware, 19898, and shall execute all necessary transfer documents.

The Court further **ORDERS** that, through this judgment, an immediate constructive trust is imposed upon all properties and funds previously transferred to the individuals listed above to the extent that such funds and/or properties are returned to Liv Kennedy at any time, including through sale of the properties, including the Mercedes Benz automobile and the pier purchased by Liv Kennedy, or through actions undertaken to collect upon or recoup loans or investments made with such funds.

The Court, through this judgment, further imposes an immediate constructive trust on all security interests held by Liv Kennedy with regard to loans made to Magne Olav Hansen and Olav Ostnes or others, and the Court directs that Liv Kennedy shall not take any action which adversely affects these security interests.

It is finally **ORDERED** that all parties shall bear their own attorney fees, with Defendant E.I. DuPont de Nemours to bear the taxable court costs expended by Plaintiff Kari Ellen Kennedy; and Defendant E.I. DuPont de Nemours and Liv Kennedy to bear their own taxable court costs, respectfully.

This shall be considered the entry of final judgment for purposes of appeal. All pending motions not previously ruled upon are denied as **MOOT** and any relief not specifically granted herein is **DENIED**.

It is so ordered.

[SEAL]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, Deceased,	§	**Civil Action Number 1:01-CV-904**
Plaintiff,	§	
v.	§	
E.I. DUPONT DE NEMOURS & CO., et al,	§	
Defendants.	§	

ORDER ON MOTION FOR ATTORNEY'S FEES

(Filed Oct. 5, 2005)

Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, the Local Rules of The United States District Court for the Eastern District of Texas, Appendix B, and order of the District Court, this matter is before the undersigned United States Magistrate Judge, at Beaumont, Texas, for all proceedings and entry of judgment in accordance with the consent of the parties. Pending before the Court is *Plaintiff's Fed. R. Civ. P. 54(d)(2) Motion for ERISA Prevailing Party Attorney Fees Under 29 U.S.C. § 1132(g)(1)* [Clerk's doc. #72].

Background

This proceeding is governed by ERISA (Employment Retirement Income Security Act, Title 29, United States Code, Section 1001 *et seq.*). Plaintiff, Kari Ellen Kennedy, as independent executrix of her father's estate, brought claims against Defendant E.I. DuPont De Nemours and Company and Plan Administrator for DuPont Savings and Investment Plan (collectively "DuPont"), seeking the payment of her decedent father's benefits under DuPont's Savings and Investment Plan ("SIP.") The detailed factual background giving rise to the complicated circumstances made the basis of the litigation are fully set forth in the parties' *Stipulation(s) of Facts* [Clerk's doc. #s 33, 70] and this court's *Order on Motions for Summary Judgment* [Clerk's doc. #61]. Ultimately, the Court entered summary judgment in favor of Plaintiff Kari Kennedy, holding that, as a matter of law, as executrix she was entitled to the value of her father's SIP benefits at the time of his death, totaling $402,152.56. *See Order on Motions for Summary Judgment.* DuPont also filed third party claims against Liv Kennedy, the decedent's ex-wife, for reimbursement of those funds. DuPont and Liv Kennedy later resolved those claims by agreement. *See Motion for Entry of Agreed Judgment as to Third Party Claims Against Liv Kennedy* [Clerk's doc. #71].

Accordingly, all claims have been adjudicated and the Court is prepared to enter final judgment.[1] Federal Rule of Civil Procedure 58 directs that "entry of judgment shall not he delayed, nor the time for appeal extended, in order to tax costs or award fees, except . . . when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court may act before a notice or appeal has been filed and has become effective . . . " FED. R. CIV. P. 58(c) (emphasis added). Rule 58(c)"s directive simplifies the determination of the proper time for filing an appeal when there is a fee dispute at the close of litigation. *Cooper v. Pentecost,* 77 F.3d 829, 833 (5th Cir. 1996). The Court finds it "more efficient to decide [the] fee question[ ] before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case," FED. R. CIV. P. 58 (1993 Adv. Comm.'s Note). This is because the two parties apparently cannot agree on the fees and an appeal is likely. Exercising the discretion granted to the court under Rule 58,[2] the undersigned finds that

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[1] The deadline for a prevailing party to file a motion for attorney fees is "no later than 14 days after entry of judgment." FED. R. CIV. P. 54(d)(2)(B). Here, the Court has yet to enter final judgment under Federal Rule of Civil Procedure 58. Therefore, the motion is "early," but for the reasons discussed herein, the Court finds it proper to consider the fee dispute before entry of judgment. *See Cooper v. Pentecost,* 77 F.3d 829, 833 (5th Cir. 1996).

[2] The 1993 Advisory Committee's Note to Rule 58 states that:

(Continued on following page)

final judgment should be delayed until the fee dispute is resolved. Therefore, as a last matter, the Court will address Plaintiff's request for attorney fees before closing the case.

Discussion

a. Standard for Recovery of Attorney Fees

The relevant ERISA fee provision provides in pertinent part: "[i]n any action . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party. 29 U.S.C. § 1132(g)(1). In fact, the Fifth Circuit has stated that a party need not prevail in order to be eligible for an award of attorneys' fees under Section 1132(g)(1) of ERISA. *Gibbs v. Gibbs*, 210 F.3d 491, 504 (5th Cir. 2000). At the same time, generally, a proper analysis of the applicable

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Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment . . . [citation omitted] . . . However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision *permits*, but does not require, *the court to delay the finality of the judgment for appellate purposes* under revised Fed. R. App. P. 4(a) *until the fee dispute is decided.* To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes.

FED. R. CIV. P. 58 (1993 Adv. Comm.'s Note) (emphasis added).

factors will in most instances favor an award of fees to the party which has most substantially prevailed. *Id.* The appropriate factors to be used in determining the underlying awards of attorneys' fees under ERISA are as follows:

> (1) the degree of the opposing parties' culpability or bad faith;
>
> (2) the ability of the opposing parties to satisfy an award of attorneys' fees;
>
> (3) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances;
>
> (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and
>
> (5) the relative merits of the parties' position.

Id. (Citing *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1458 (5th Cir. 1995); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980)). The Fifth Circuit also stated, in dicta, that this list should be non-exhaustive, and none among the five factors is entitled to greater weight – much less unilaterally determinative powers – than any of the others. *Riley v. Admin. of the Supersaver 401K Capital Accumulation Plan*, 209 F.3d 780, 782 (5th Cir. 2000). Both parties advance their arguments on the application of these factors in the extensive briefing before the Court. *See Plaintiff's Motion*; *DuPont's Objections to Affidavits Submitted by*

Plaintiff in Support of Attorney Fee Claim [Clerk's doc. #74]; *Defendants' Response to Plaintiff's Motion for Attorney Fees* [Clerk's doc. #75]; *Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Attorney Fees and Objections to Affidavits Submitted by Plaintiff* [Clerk's doc. #77]; *Defendants' Sur-Reply to Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Attorney Fees and Objections to Affidavits Submitted by Plaintiff* [Clerk's doc. #80].

b. Application of the Factors

i. The Degree of Culpability or Bad Faith

Plaintiff maintains that DuPont is culpable for the loss of her father's SIP funds to the improper beneficiary. *See Motion.* She argues that DuPont acted with reckless disregard, including, but not limited to, failing to consider alternatives to paying out the funds to Liv Kennedy and failing to interplead the funds. Culpable conduct that does not rise to the level of bad faith may weigh in favor of awarding fees. *See, e.g., Dial v. NFL Players Supplemental Disability Plan*, 174 F.3d 606, 614 (5th Cir. 1999); *Wegner v. Standard Ins. Co.*, 129 F.3d 814, 821 (5th Cir. 1997).

In ruling on Plaintiff's claims, the undersigned concluded that DuPont's distribution of the plan benefits was not discretionary in nature. *See Order on Motion for Summary Judgment.* Also, rather than basing its decision on wrongful conduct by DuPont, such as the breach of fiduciary duty, the Court

concluded that Liv Kennedy was the improper beneficiary because she waived her SIP benefits. *Id.*

These findings do not support any imputation of bad faith or recklessness on the part of DuPont. There was no evidence that the DuPont Plan Administrator's decision affected the amount of money expended by the Plan; instead the Plan paid the same amount it would have paid if it had paid the Plaintiff originally. *See Diaz*, at 613. The Plan administrators had no incentive to pay one beneficiary over another. They merely chose to interpret the Plan documents and the legal precedent in the way they found to be correct. *See id.* Plaintiff is correct when she argues that DuPont's decision conflicted with the correct statement of the federal common law rule of waiver as announced by the Fifth Circuit. This court's ruling clearly reflects that. *See Order on Motion for Summary Judgment*. However, as DuPont argues, and this court's prior discussion illustrates, at the time DuPont made its decision, after the United States Supreme Court's ruling in *Egelhoff v. Egelhoff*,[3] the application of that case, especially in the Fifth Circuit, was unclear. DuPont relied on *Egelhoff* and maintains that such reliance was proper. The fact that this court and other courts have later applied *Egelhoff* differently than DuPont did at the time of the payment of the funds does not impute bad faith or recklessness. Plan administrators are often faced

[3] 532 U.S. 141 (2001).

with such choices and must simply make the decision they find to be correct in light of the law. DuPont did just this, and although the Court found that interpretation to be incorrect, it would be improper to attribute wrongdoing, culpability, or even recklessness to DuPont's good faith decision on the payment of the funds. In fact, their decision ultimately harmed the Plan in forcing a double-payment to two beneficiaries. The Court agrees with Plaintiff that an interpleader action would have been the best and most efficient means for resolving this dispute in the first place. However, as DuPont argues, filing the interpleader would have been the best way to protect its own interests, rather than that of the competing claimants. DuPont's decision to handle the funds in the manner it did, and its decision to refrain from interpleading the funds (while in hindsight not the best decisions), surely do not rise to the level of bad faith or culpability on its part. Accordingly, the Court finds that the bad faith factor weighs against the award of attorney fees to Plaintiff.

ii. DuPont's Ability to Satisfy an Award of Fees

The Court agrees with Plaintiff that DuPont, if required, would be able to satisfy an award of fees. There is no dispute that DuPont is a large, multinational corporation with assets far in excess of the requested fee in this proceeding. Accordingly, this factor weighs in favor of Plaintiff.

iii. Whether the Award of Fees Would Deter Others Acting in Similar Circumstances

Plaintiff generally argues that assessing attorney fees against DuPont will deter it and other entities from acting hastily in determining the proper beneficiary when dispensing the funds of an ERISA-governed benefit plans [sic]. *See Motion*. She further contends that the award of an attorney fee will encourage DuPont and other plan administrators to apply the correct legal standard when determining the "proper payee." At the same time, DuPont argues that it is already being punished by having to pay the benefits of the SIP plan twice – first to Liv Kennedy, and now, to Plaintiff. DuPont also contends that because there is no culpability on its part and it acted in good faith, an award of fees in an attempt to deter future conduct would be improper.

Again, the Court finds the Fifth Circuit's analysis in the *Dial* case to be instructive. There, the Court held that the award of attorney's fees would have no deterrent effect, as the plan administrators were merely choosing "to interpret an outside document in the way they found correct." *Dial*, 174 F.3d at 613. Because the undersigned found that DuPont made the same type of decision here, it also concludes that an award of fees would not necessarily deter future plan administrators from acting similarly. Using the fee award as punishment does no more than encourage plan administrators to employ the correct legal standard when determining the proper beneficiary. This is exactly what DuPont attempted to do. The

Court has already instructed DuPont on the correct legal standard with its summary judgment ruling and finds that such instruction will serve to defer similar incorrect decisions in the future. Further, the Court agrees that DuPont having to double-pay the SIP funds[4] is a large enough sum of money to deter any wrongful conduct in the future.

iv. Whether the Parties Requesting Fees Sought to Benefit All Participants and Beneficiaries of the Plan or to Resolve a Significant Legal Question Involving ERISA Itself

Here, the issues related only to the parties specifically involved with the decedent's SIP benefits. Plaintiff sought to recover amounts due to her. Plaintiff's claims do not benefit all of the SIP beneficiaries or necessarily resolve a significant legal issue. The relief granted to Plaintiff is not injunctive in nature and does not directly affect the methods employed by DuPont in dispensing funds to beneficiaries. *Compare Phillips v. Maritime Assoc. L.L.A.*, 198 F. Supp. 2d 838, 845 (E.D. Tex. 2002). Accordingly, this factor does not weigh in favor of the award of fees.

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[4] The value of the SIP funds due to Plaintiff is $402,152.56. *See Order on Motions for Summary Judgment*. Accordingly, due to the double-payment, DuPont could end up paying over $800,000 under decedent's SIP.

v. The Relative Merits of the Parties' Positions

As evidenced by its ruling in her favor, the Court found that the Plaintiff's position was with merit and ultimately correct. In contrast, the Court found that DuPont erred in dispensing funds to Liv Kennedy and that it continued to err when defending this decision under what the Court found to be incorrect legal standards. The Court therefore concludes that because Plaintiff's position was meritorious, this factor weighs in her favor. However, the Court also notes that the plaintiff's "prevailing party" status in not determinative under the Bowen[5] factors in [sic] assessing attorney fees in an ERISA case. *Gibbs v. Gibbs*, 210 F.3d 491, 504 (5th Cir. 2000).

Conclusion

Having considered the governing factors when determining a request for attorney fees under ERISA, the Court finds that it should not award Plaintiff her attorney fees. Only two out of the five Bowen factors weigh in her favor, and of these, the merit factor weighs in her favor only slightly. Additionally, the Court finds that DuPont did not act in bad faith or with recklessness but rather simply made the decision it thought best under the circumstances, however erroneous it may have been in hindsight.

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[5] The applicable factors were first announced in *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980).

Considering these reasons as a whole and using the explication of the Bowen factors contained herein as support,[6] the Court **ORDERS** that the *Plaintiff's Fed. R. Civ. P. 54(d)(2) Motion for ERISA Prevailing Party Attorney Fees Under 29 U.S.C. § 1132(g)(1)* [Clerk's doc. #72] is **DENIED**. Having made such determination, the Court need not assess the reasonableness or amount of any fee.

It is so ordered.

SIGNED this the 5th day of October, 2005.

/s/ Keith F. Giblin
KEITH F. GIBLIN
UNITED STATES
MAGISTRATE JUDGE

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[6] When considering a request for attorneys' fees under Section 502(g) of ERISA, the court should consider and explicate the five Bowen factors, and should do so without giving predominance or preclusive effect to any one of them. *Riley v. Admin. of the Supersaver 401K Capital Accumulation Plan*, 209 F.3d 780, 782-83 (5th Cir. 2000).

[SEAL]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, Deceased, ***Plaintiff,***	§	
v.	§	**CIVIL ACTION NO. 1:01-CV-904**
E.I. DUPONT DE NEMOURS AND COMPANY AND PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, ***Defendant.***	§	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

(Filed Mar. 03, 2005)

Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, the Local Rules of The United States District Court for the Eastern District of Texas, Appendix B, and order of the District Court, this matter is before the undersigned United States Magistrate Judge[1], at Beaumont, Texas, for all

[1] This civil action was previously assigned to the Honorable Wendell C. Radford. Effective October 1, 2004, Judge Radford

(Continued on following page)

proceedings and entry of judgment in accordance with the consent of the parties. The following motions are pending before the Court:

-Defendants' Motion for Summary Judgment [Clerk's doc. #40] filed by E.I. du Pont de Nemours and Company ("DuPont") and Plan Administrator for DuPont Savings and Investment Plan ("Plan Administrator");

-Plaintiff's Motion for Summary Judgment, filed by Kari Ellen Kennedy [Clerk's doc. #41]; and

-Third Party Plaintiffs' Alternative motion for Summary Judgment Against Third Party Defendant asserted by DuPont and Plan Administrator [Clerk's doc. #39].

A. Background

i. Facts

According to the pleadings, motions and the agreed *Stipulation of Facts* [Clerk's doc. #33] filed by the parties, the Court summarizes the material background facts as follows. William Patrick Kennedy was an employee of DuPont and participated in DuPont's Savings and Investment Plan ("SIP"). While an employee of DuPont, on June 30, 1971, Mr. Kennedy married Liv Kennedy. On December 6, 1974, Mr.

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retired and his docket was reassigned to the undersigned United States Magistrate Judge.

Kennedy signed a written designation form identifying Liv Kennedy as his sole beneficiary under the SIP. Additionally, Mr. Kennedy signed a beneficiary designation form for his DuPont Tax Reform Act Stock Ownership Plan ("TRASOP") on July 21, 1980, also designating Liv Kennedy as the sole beneficiary. According to the parties, the SIP and TRASOP merged prior to Mr. Kennedy's death and are referred to, collectively, as the SIP. The Kennedys divorced on June 2, 1994, in Jasper County, Texas, which is evidenced by a *Final Decree of Divorce. See Exhibit 1 to Stipulation of Facts.* On June 30, 1998, Mr. Kennedy retired from DuPont. He passed away March 27, 2001.

On April 16, 2001, Kari Ellen Kennedy Duckworth ("Kari Duckworth") qualified as Independent Executrix of her father's estate. On April 26, 2001, she demanded by letter that the DuPont plan pay the SIP benefits to Mr. Kennedy's estate. Said demand was rejected. The plan administrator paid the benefits of the SIP to Liv Kennedy as the beneficiary designated by Mr. Kennedy. The benefits were paid to Ms. Kennedy in an amount totaling $414,143.22. *See Third Party Plaintiff's Alternative Motion for Summary Judgment Against Third Party Defendant.*

ii. Issues

In her motion, Plaintiff Kari Duckworth requests that DuPont pay the value of the decedent's SIP to

her as executrix of her father's estate. She argues that Liv Kennedy waived her interest in the SIP in her divorce decree, and therefore, the interest belongs to Plaintiff Duckworth under common law. Alternatively, Defendant DuPont contends that it did not wrongly pay the SIP proceeds to Liv Kennedy. DuPont relies on federal law preemption, arguing that as a matter of law ERISA preempts the language contained within the state divorce decree and overrides the waiver argument. Therefore, the undersigned must analyze which argument prevails legally to determine the proper recipient of the SIP interest.

Additionally, DuPont and the Plan Administrator filed their *Amended Third Party Complaint* against Liv Kennedy based upon theories of unjust enrichment and the provisions of the SIP plan [Clerk's doc. #37]. DuPont specifically seeks this relief in the event that it does not prevail on its Motion for Summary Judgment and the Court finds that the benefits were wrongly paid to Liv Kennedy. This request for recovery of the funds paid to Ms. Kennedy is the basis for DuPont's *Alternative Motion for Summary Judgment Against Third Party Plaintiff*, the merits of which the Court need not reach until the ultimate issue of the proper SIP recipient is determined.

B. Discussion

General Summary Judgment Standard of Review

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). This rule places the initial burden on the moving party to identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986) (Quoting Rule 56(c)); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655-56 (5th Cir. 1996) (Citations omitted). The movant's burden is only to point out the absence of evidence supporting the non-movant's case. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992). When the moving party has carried its burden of demonstrating the absence of a genuine issue of material fact, the non-moving party bears the burden of coming forward with "specific facts showing that there is a genuine issue for trial," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In considering a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505 (1986).

The parties agree that no genuine issue of material fact exists in this case other than the voluntariness of any waiver by Ms. Kennedy, if that issue becomes relevant. The *Stipulated Facts* establish the parties' agreement that the key issues are legal, not factual, in nature. Accordingly, the resolution of this

proceeding is to be decided as a matter of law, based on the legal arguments presented in the pending motions now before the Court.

Review of the ERISA Plan Administrator's Denial of the Estate's Claim

As noted above, the plan administrator distributed the proceeds of the SIP to Liv Kennedy instead of filing an interpleader action to determine to [sic] appropriate beneficiary. Therefore, the plan administrator's decision that [sic] must be reviewed under the appropriate standard of review. In *Firestone Tire and Rubber Co. V. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989), the Supreme Court held that when an administrator's denial of benefits is challenged, the decision is reviewed under a *de novo* standard unless the plan gives the administrator discretionary authority as to this decision. Dupont argues that, in this case, the plan provided the administrator with discretionary authority to interpret the plan, therefore this Court must evaluate the administrator's decision to pay Liv Kennedy under an abuse of discretion standard. At the same time, Dupont argues that the plan clearly required payment to the designated beneficiary and the administrator paid in accordance with the beneficiary designation.

In this case, the Court finds that Dupont's distribution of the benefits was not discretionary in nature. As Dupont itself contends, the administrator paid benefits under the requirements of the plan. Because

there was no discretionary authority in the administrator's decision, the denial of benefits to the estate is reviewed under a *de novo* standard. *See Brandon v. Travelers Insurance Company, et. al.*, 18 F.3d 1321, 1323-1324 (5th Cir. 1994), see also *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1118 (10th Cir.) *Cert. Denied*, 502 U.S. 1020, 112 S.Ct. 670, 116 L.Ed.2d 761 (1991) (*de novo* standard applies when a plan compels the company to pay proceeds to the beneficiary of record).

ERISA Preemption and Waiver Issues

There is no dispute that the DuPont SIP is an ERISA[1] plan. ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Fifth Circuit held that the Texas beneficiary redesignation statute, Texas Family Code Section 9.301, relates to employee benefit plans and is preempted by ERISA. *Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. 2000). In *Manning*, the Fifth Circuit reaffirmed the rule set forth in *Clift v. Clift*, 210 F.3d 268 (5th Cir. 2000) and *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994), that federal common law, rather than the text of ERISA itself, governs resolution of cases in which a former spouse who is still the designated beneficiary of a policy governed

[1] Employment Retirement Income Security Act, Title 29 United States Code, Section 1001 *et seq.*

by ERISA is alleged to have waived her rights to the policy benefits. *Manning*, 212 F.3d at 872. The Fifth Circuit opted not to follow the minority view adopted by the Sixth Circuit[1], which employs the principles of conflict preemption, noting that "the law of family relations, which includes an individual's right to expressly apportion property upon divorce, has traditionally been a fairly sacrosanct enclave of state law." *Id.* at 872. The court determined that in applying federal common law, the courts should borrow from state law when determining the law that should control. *Id.* According to the Fifth Circuit, the rule of federal common law applicable to disputes concerning waiver by a designated beneficiary of an ERISA plan is that "a named ERISA beneficiary may waive his or her entitlement to the proceeds of an ERISA plan providing life insurance benefits, provided that the waiver is explicit, voluntary, and made in good faith." *Id.* at 874.

Dupont questions whether this is still the law in the Fifth Circuit, given the U.S. Supreme Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141, 149 L. Ed. 2d 264, 121 S. Ct. 1322 (2001). In *Egelhoff*, the Supreme Court held that ERISA preempted a Washington state statute providing for automatic revocation of the designation of a former spouse upon

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[1] *See Manning*, at 871 (Citing *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997); *Metropolitan Life Ins. Co. v. Pressley*, 82 F.3d 126 (6th Cir. 1996); *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990).

divorce. *Egelhoff*, 532 U.S. at 143. The Court noted that preemption of such statutes is necessary to prevent "requiring ERISA administrators to master the relevant laws of 50 states." *Id.* at 149. However, the Court limited its holding to the finding that the Washington statute was expressly preempted by ERISA and declined to address whether the principles of conflict preemption applied. *Id.* at 146. The Court also failed to address the circuit split regarding whether federal common law or ERISA itself governs in cases of preemption and did not overrule the Fifth Circuit's common law approach as set out in *Clift* and *Brandon*.

Accordingly, this court was left with the doubt cast by *Egelhoff* on the state of Fifth Circuit law regarding the divorced beneficiary/ERISA preemption issue. However, the undersigned derived much guidance from Judge Schell's detailed analysis in *Metropolitan Life Ins. Co. v. Palmer*, 238 F.Supp. 2d 821 (E.D. Tex. 2002).

First, as pointed out in *Metropolitan Life*, the *Egelhoff* case is distinguishable from *Brandon*. *Egelhoff* involved a state statute that affected the designation of beneficiaries, while *Brandon* involved a divorce decree that might constitute a waiver under federal common law. *Metropolitan Life*, at 825-26. Also, neither of the Fifth Circuit opinions discussing *Egelhoff* have clearly overridden *Brandon* nor adopted the *Egelhoff* holding in a case with facts similar to those before the Court in this case.

Also, in *Egelhoff* the Supreme Court declined to address whether conflict preemption applies and did not overrule the federal common law approach set forth in *Brandon* and *Clift*. Absent a clear showing that the *Brandon* rule is no longer applicable or that it has been overruled by the Supreme Court, this court was not in a position to depart from the established law of the Fifth Circuit. *See Metropolitan Life*, at 226. (Quoting *Manning v. Hayes*, 212 F.3d 866, 872 (5th Cir. 2000)).

Any doubt left regarding this issue was resolved by the Fifth Circuit's recent ruling in *Guardian Life Insurance Company v. Finch*, 295 F.3d 238 (5th Cir. 2004). In *Finch*, the Fifth Circuit held that "*Egelhoff* does not undermine this court's longstanding approach of relying on federal common law to determine if an ERISA plan's beneficiary has effected a common law waiver." *Id.* at 242. The Fifth Circuit again recognized the federal common law rule of waiver, reemphasizing its "longstanding approach of relying on federal common law to determine if an ERISA plan's beneficiary has effected a common law waiver." *Id.* at 243. This Court therefore concludes that since no resolution of the case maybe reasonably drawn from the text of ERISA itself, we must look to federal common law. Accordingly, Plaintiff prevails on her argument.

Did Liv Kennedy voluntarily waive the SIP benefits in the divorce decree?

The Court now turns to the federal common law of waiver. As stated *supra,* In *Manning,* the Fifth Circuit reiterated the rule that any waiver of ERISA benefits must be explicit, voluntary, and made in good faith. 212 F.3d at 874. The *Final Decree of Divorce*[4], signed and executed by decedent, Liv Kennedy, and their respective attorneys, clearly states that Liv Kennedy is divested of all right, title, interest and claim in and to such property including "the proceeds therefrom, and any other rights related to any profit-sharing plan, savings plan, employee thrift plan, employee stock, ownership plan, retirement plan, pension plan, or like benefit program, existing by reason of Respondent's . . . employment, except for that portion awarded to Liv Kennedy, hereinabove." The portion reserved and awarded to Ms. Kennedy, as mentioned in the divorce decree, was addressed separately by a Qualified Domestic Relations Order and a Second Amended Qualified Domestic Relations Order: DuPont Pension and Retirement Plan, both filed in the District Court in Jasper County, Texas. *See Exhibit 5 to Plaintiff's Motion.* The amount awarded to her by the QDRO is not in dispute.

The Court must address the facts presented in Liv Kennedy's *Affidavit,* attached to her *Response to*

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[4] *See Exhibit 1 to Stipulation of Facts and Exhibit 4 to Plaintiff's Motion for Summary Judgment.*

Plaintiff's Motion for Summary Judgment and Third-Party Plaintiff's Alternative Motion for Summary Judgment. Ms. Kennedy claims that she "had no actual knowledge" that she was giving up her right as beneficiary of the SIP funds. She does not recall reading over the divorce decree, "opting instead to simply take the advice of my attorney." This language is problematic because, assuming Liv Kennedy's assertions are true, they directly controvert her knowing waiver set forth in the divorce decree. However, the Court finds that the facts presented by the affidavit do not create a genuine issue of fact as to the waiver presented in the divorce decree. The cases clearly establish that a divorce decree such as the one presented constitute a knowing and voluntary waiver as a matter of law. *See Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir. 1994). The Court is not in a position to second-guess Liv Kennedy's state of mind at the time she signed the decree. Although she makes conflicting statements in her affidavit, they are only asserted now that the SIP proceeds are the subject of litigation. The divorce decree stands on its own, and Liv Kennedy's intentions to waive her right to the SIP proceeds are corroborated by the QDROs, discussed *supra,* filed long after the period surrounding the execution of her divorce decree. For these reasons, the Court cannot give full credit to Ms. Kennedy's statements.

Liv Kennedy initiated the divorce, was represented by counsel, and executed the decree. The Court finds that the language contained within the

divorce decree is virtually identical to the language of the decree in *Brandon*. The decree clearly evidenced Ms. Kennedy's explicit, voluntary and good faith waiver of any rights to the proceeds of the SIP.

Additionally, this is not a case such as *Metropolitan Life* where the divorce decree is unsigned by the parties and entered as a court order, thus creating factual issues as to the voluntariness of the waiver. 238 F. Supp. 2d at 826. Instead, it is clear that Ms. Kennedy's waiver of the SIP proceeds was done under the advice of counsel and voluntarily. The parties have stipulated to its validity. The waiver is further supported by the entry of the Second Amended QDRO, expressly addressing the DuPont plan benefits. Applying the federal common law of waiver in this matter, it is clear that Ms. Kennedy waived her rights to the SIP benefits at issue.

Dupont argues that finding of waiver on Liv Kennedy's part would violate the anti-alienation provision of ERISA set forth in Title 29, United States Code, Section 1056(d)(1). Section 1056(d)(1) provides that each *pension plan* shall provide that benefits may not be assigned or alienated. 29 U.S.C. § 1056(d)(1) (emphasis added). Dupont correctly notes that *Manning, Clift,* and *Brandon* all involve insurance proceeds which are not subject to the anti-alienation provision. In addition, Dupont points out that a domestic relations order qualifying as a QDRO (which is a listed exception to the anti-alienation rule) was never submitted for the SIP, although one

was submitted for the [sic] another account not in controversy in this case.

In 1984, Congress passed the Retirement Equity Act ("REA"), which amended ERISA. The REA created the Qualified Domestic Relations Order "QDRO," which is a mechanism for recognizing the interest of the non-participant spouse in benefits under ERISA retirement plans. *See Dorn v. Int'l Bhd. of Elec. Workers,* 211 F.3d 938, 942 (5th Cir. 2000). The QDRO protects divorced spouses, who, as a result of the divorce, might not receive the benefits they otherwise would have had available during their retirement as a means of income. *Boggs v. Boggs,* 520 U.S. 833, 847, 117, S.Ct. 1754, 138 L.Ed.2d 45 (1997). Among other things, a QDRO must contain the name of the alternate payee and amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which such amount or percentage is to be determined. 29 U.S.C. § 1056(d)(3)(C).

In this case, the decedent had no reason to submit a QDRO to the SIP due to the fact that none of the proceeds of that account were subject to division in the divorce. This Court looks once again to the Fifth Circuit's decision in *Brandon* for guidance and determines that Liv Kennedy's voluntary waiver does not violate the anti-alienation provision of ERISA. In *Brandon,* the Fifth Circuit noted that the ERISA plan in question was a welfare plan and, therefore, was not subject to the anti-alienation provision of ERISA. *Brandon,* 18 F.3d at 1324. However, the Brandon

court also stated that, even so, "[w]e have previously held that a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an assignment made pursuant to a bona fide settlement of such a controversy is not invalidated by the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1)." *Id.* at 1324, n.4 (Citing *Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989). The Seventh Circuit also held that an ex-spouse's waiver does not violate the anti-alienation provision of ERISA. *See Fox Valley & Vicinity Constr. Workers' Pension Fund v. Brown,* 897 F.2d 275, 277-280 (7th Cir. 1990), *cert. denied,* 498 U.S. 820 (1990).

Accordingly, the benefits were wrongly paid to Ms. Kennedy and, as Executrix of the decedent's estate, Kari Kennedy Duckworth is entitled to the value of decedent's SIP at the time of his death, which, according to the *Stipulation of Facts,* was $402,152.56 on March 31, 2001 (four days after his death). Ms. Kennedy Duckworth prevails on her motion for summary judgment.

Alternative Motion Regarding Liv Kennedy's Reimbursement to DuPont

Having found that Ms. Kennedy waived her right to the SIP proceeds, the Court must analyze the Plan Administrator's request for reimbursement from Ms. Kennedy. The relevant provision is Section 502(a)(3) of ERISA, codified at 29 U.S.C. § 1132(a)(3). This

section allows for "equitable relief," and DuPont argues that it is entitled to restitution and recovery for unjust enrichment, specifically the recovery of the improper payment to Ms. Kennedy, as equitable relief.

Section 502(a)(3) arms plan administrators with a cause of action "to obtain . . . appropriate equitable relief" to redress any act in violation of ERISA or the terms of the plan. 29 U.S.C. § 1132(a)(3). The Supreme Court has interpreted the boundaries of "equitable relief" under Section 502(a)(3) as limiting a plaintiff's remedies to those that were traditionally considered equitable in nature. *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 210 (2002) (Quoting *Mertens v. Hewitt Associates,* 508 U.S. 248, 256 (1993)). The Court emphasized that Congress' use of the word "equitable" was not inadvertent, but rather was a deliberate act on its part to limit a Section 502(a)(3) plaintiff's remedies to those that were traditionally considered equitable in nature. *Id.* at 221. The Court noted that in cases in which the plaintiff could not assert title or right to a particular piece of property, but in which he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him, the plaintiff had a right to restitution at law through an action derived from the common-law writ of assumpsit. *Id.* at 213. In cases such as this, the plaintiff's claim was considered legal because he sought to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money. *Id.*

In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. *Id.* However, if the property sought to be recovered or its proceeds have been so dissipated so that no product remains, the plaintiff's claim is only that of a general creditor, and the plaintiff cannot enforce a constructive trust of or an equitable lien upon the property of the defendant, *Id.* at 213-214. Thus, for an action in restitution to lie in equity, ordinarily in the form of a constructive trust or an equitable lien, an ERISA plaintiff must "seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

The Plan Administrator has submitted no summary judgment evidence establishing that the funds sought have been identified and traced to a particular account or property owned by Liv Kennedy. Indeed, it appears that the funds have been spent. *See Exhibit E to Liv Kennedy's Response* [Clerk's doc. #47]. Therefore, at this stage of the litigation, the Plan Administrator stands as a general creditor and, under *Knudson*, is not entitled to restitution.

The Plan Administrator next contends that it is entitled to restitution under the common law theory of unjust enrichment. The Fifth Circuit Court of Appeals has recently addressed this issue, interpreting *Knudson*. Specifically, the Fifth Circuit stated

that dicta in *Knudson* should not be viewed "as an invitation to the lower courts to grant plan fiduciaries a federal common law right to pursue claims for legal remedies against participants." *Coop. Benefit Adm'n, Inc. v. Ogden*, 367 F.3d 323, 332-33 (5th Cir. 2004). In *Ogden*, Judge Wiener noted that a plan fiduciary's failure to state a statutory cause of action under ERISA does not bar federal subject matter jurisdiction over its unjust enrichment claim under federal common law. *Id.* at 328. However, the ability of a plaintiff to state a federal common law cause of action depends on the existence of a "gap" in the text of ERISA that allows for the creation of the federal common law remedy sought by the plaintiff. *Id.* at 329. The *Ogden* court also stated that *Knudson* and *Mertens* demonstrate that Congress, in drafting Section 502(a)(3)(B) to allow only equitable relief, specifically contemplated the possibility of extending to plan fiduciaries the right to sue a participant for money damages and chose instead to limit fiduciaries' remedies to those typically available in equity. *Id.* at 331. Therefore, there is no "gap" in ERISA on this question and thus no basis for granting a common law remedy. *Id.* In conclusion, the Fifth Circuit refused to create a federal common law right of unjust enrichment that would allow a plan fiduciary to assert an action for legal relief against a participant, both parties being members of categories expressly identified in Section 502. *Id.* at 333.

This Court finds *Ogden* dispositive on the issue. ERISA is not silent on this matter. ERISA allows the

kind of equitable relief sought by the Plan Administrator only if the proceeds are clearly traced to particular funds or property in Liv Kennedy's possession. There has not been such a showing in this case. Therefore, this Court cannot create a federal common law right to the relief sought in this instance.

Also in *Ogden*, the Fifth Circuit distinguished its previous decision of *Jamail, Inc. v. Carpenters District Council of Houston Pension & Welfare Trusts*, 954 F.2d 299 (5th Cir. 1992), a case upon which DuPont relies heavily. *Jamail* is distinguishable from the facts in *Ogden*, and the facts in this case, because it involved an employer's common law right to recover contribution overpayments. *Ogden*, at 333 (emphasis added). In *Ogden*, the Fifth Circuit noted that ERISA Section 502 provides a private right cause of action for fiduciaries, participants, and beneficiaries, but not for employers and, therefore, reasoned that a "gap" existed in ERISA's text regarding an employer's rights to recover overpayment of contributions from the plan to which such overpayments had been made. *Id.* Thus, in *Jamail*, the Court held that recognition of a federal common law right of restitution for an employer vis-a-vis a plan was appropriate, as ERISA's text did not address the issue, and such a right would further ERISA's underlying purposes by encouraging small employers to sponsor benefit plans for their employers [sic]. *Id.*

In the case at bar, a private right of action for equitable relief is enumerated under Section 502(a). Therefore, there is no "gap" which would allow the

Court to "rewrite" ERISA and create a common law right.

Directed by *Ogden*, the undersigned cannot allow DuPont and the Plan Administrator to proceed with their claims for restitution and unjust enrichment. *Ogden* clearly decides against granting a federal common law right of unjust enrichment or restitution for a plan administrator under Section 502(a)(3). Additionally, DuPont has not established that its claims are equitable, rather than legal, in nature, as defined by *Knudson* and *Ogden*. The Court cannot differentiate the situation before it from the cases discussed herein. By attempting to recover funds from Ms. Kennedy, DuPont is seeking a legal remedy. To impose personal liability on a defendant for a contractual obligation to pay money is legal in nature and unauthorized by Section 502(a)(3). *See Knudson*, 534 U.S. at 210, 221. Although DuPont couches its claims in equitable terms, it continuously argues that it would be against the terms of the plan if Ms. Kennedy were not required to reimburse the proceeds. This clearly indicates a contractual liability as DuPont seeks to impose personal liability to pay money on Ms. Kennedy. *See id.* at 211. Further, there is no evidence that the proceeds are in Ms. Kennedy's possession or that they exist in the form of a constructive trust or an equitable lien. *See id.* at 213. None of the cases presented by DuPont establish that their claim is equitable in nature and therefore valid under ERISA. In fact, DuPont relies on cases which are either factually distinguishable or predate the

law as announced in *Knudson* and *Ogden*. Accordingly, the Court finds that DuPont's claim for restitution and unjust enrichment is legal, not equitable, in nature, and therefore, according to *Ogden* and *Knudson*, is not a claim that is available under Section 502(a)(3). The *Alternative Motion for Summary Judgment* should therefore be denied.

The State Law Breach of Contract Claims

In her pleadings, Plaintiff originally set forth a cause of action against DuPont for breach of contract. *See Amended Complaint* (Clerk's doc. #24). DuPont has requested summary judgment on these state law contractual claims, arguing that they are preempted by ERISA. See Defendants' *Motion for Summary Judgment* (Clerk's doc. #40). Having engaged in the analysis under ERISA and granted Plaintiff relief as a beneficiary, the undersigned agrees with DuPont that the state law claims are preempted. After a review of Plaintiff's responses, the parties seem to be in agreement on this issue. Accordingly, the Court will grant DuPont summary judgment on Plaintiff Kari Kennedy Duckworth's state law breach of contract claims.

C. Order of the Court

Fully incorporating the findings and legal conclusions set forth herein, the Court **ORDERS** as follows:

-*Plaintiff's Motion for Summary Judgment* [Clerk's doc. #41] is **GRANTED**; and Plaintiff is accordingly entitled to the value of decedent's benefits at the time of his death, $402,152.56;

-*Defendant's Motion for Summary Judgment* [Clerk's doc, #40] is **DENIED** in part and **GRANTED** in part, being granted with respect to Plaintiff's state law contractual claims; and

-the *Third Party Plaintiff's Alternative Motion for Summary Judgment against Third Party Defendant* [Clerk's doc. #39] is **DENIED.**

It is so ordered.

SIGNED this the 3rd day of March, 2005.

/s/ Keith F. Giblin
KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE

IN THE DISTRICT COURT OF JASPER COUNTY
STATE OF TEXAS

IN THE MATTER OF THE MARRIAGE OF	)	
LIV KENNEDY	)	
AND	)	
WILLIAM PATRICK KENNEDY	)	**NO. 16,352**
AND IN THE INTEREST OF THEIR MINOR CHILD	)	

SECOND AMENDED QUALIFIED DOMESTIC RELATIONS ORDER
DuPont Pension and Retirement Plan

(Filed Dec. 3, 1997)

William Patrick Kennedy ("Participant"), is an employee of E.I. du Point de Nemours and Company and is a Participant in the DuPont Pension and Retirement Plan ("the Plan").

The parties to this action for divorce were married to each other on June 30, 1971, and were divorced by this Court in this action on May 6, 1994.

This Court has personal jurisdiction over both parties and jurisdiction over the subject matter of this Order in this divorce action.

The parties to this action and the Court intend this Order to be a "qualified domestic relations order" ("QDRO") as that term is used in the Retirement

Equity Act of 1984, P.L. 98-397 and defined as §206(d)(3)(B)(i) of ERISA and §414(p)(1)(A) of the Internal Revenue Code to create and recognize the interest of Liv Kennedy in certain Plan benefits otherwise payable to Participant.

This Order is entered pursuant to Texas domestic relations law, specifically Texas Family Code Section 3.63 and 3.633 governing the division of marital property retirement benefits and financial plans between spouses and former spouses in divorce actions and applies to the Plan.

The parties have stipulated that the Court should enter this Order.

Now, therefore, it is **ORDERED** as follows:

1. The Participant is William Patrick Kennedy, Social Security Number XXX-XX-XXXX. The Participant's last known mailing address is [address omitted], and the Participant's date of birth is XXXX.

2. The Alternative Payee is Liv Kennedy, Social Security Number XXX-XX-XXXX. The Alternate Payee's mailing address is [address omitted], and the Alternate Payee's date of birth is XXXX.

3. The plan to which the order applies: DuPont Pension and Retirement Plan and any successor plans.

4. This Order creates and recognizes the existence of Alternate Payee's right to receive a portion of the benefits payable with respect to the Participant in the Plan. Such accrued benefit is an amount determined under the Plan formula that is payable as a monthly annuity at the Participant's normal retirement age (65) and for the Participants lifetime. The formula to calculate the benefits is as follows:

Participant's Accrued Benefit as of 05/06/94	X	Number of months Participant and Alternate Payee were married *while Participant was in Plan through 05/06/91* Total number of months Participant was in the Plan as of 05/06/94.	X 50%

5. The Alternate Payee's portion of the Participant's accrued benefit shall be paid in the form of a monthly annuity for the Alternate Payees lifetime.

6. Alternate Payee may elect to begin receiving her portion of the accrued benefit at the Participant's earliest retirement age under the Plan (age 50 with at least 15 years' service) or anytime thereafter at her election. If the Alternate Payee elects to begin receiving her share of benefits prior to the Participant's normal retirement age (65), then she will receive the actuarial equivalent of the amount of retirement under the formula provided. The Alternate Payee must begin receiving benefits no later than the date

the Participant commences receiving benefits from the Plan.

7. If the alternate Payee elects early payment and the participant subsequently retires under a provision of the Plan which provides a subsidized early retirement benefit, the alternate payee's benefit will be recalculated to include the early retirement subsidy attributable to the Alternate Payee's share of the accrued benefit.

8. Under the provisions of this Order, and specifically paragraph four (4) above, if the Plan pays a cost-of-living increase to the participant after the participant has commenced receiving his benefit, the alternate payee will not receive a share of such increase. If the alternate payee elects to receive a benefit from the Plan, the alternate Payee will forfeit any cost-of-living increases she would otherwise share in.

9. The Alternate Payee is awarded the status of surviving spouse for a portion of the available qualified pre-retirement survivor annuity (QPSA) until the earliest of (1) when the alternate Payee elects to begin receiving benefits from the Plan; or (2) when the Participant elects to begin receiving benefits from the Plan. This benefit shall be payable in the form of a monthly annuity for the Alternate Payee's lifetime. The accrued benefit will be reduced in accordance with Plan provisions to cover the cost of the QPSA. This benefit shall be calculated as follows:

The Alternate Payee shall receive a portion of the available qualified pre-retirement survivor annuity (QPSA) calculated as follows:

follows:

Number of months Participant and Alternate Payee were married *while Participant was in Plan*
Number of months Participant was in the Plan as of the Earlier of his separation from service or his death.

X 50% Available QPSA

10. This order is not intended to: (a) require the Plan to provide any type or form of benefit, or any option, not otherwise provided under the Plan; (b) required the Plan to provide increased benefits (determined on the basis of actuarial value), (c) require the payment of benefits to an Alternate Payee which are required to be paid to another Alternate Payee under another order previously determined to be a qualified domestic relations order.

11. This Order is intended to be a QDRO made pursuant to the Retirement Equity Act of 1984 and its provision shall be administered and interpreted in conformity with that Act.

12. This Order requires the Plan to distribute benefits directly to the Alternate Payee.

13. the Alternate Payee shall include all benefits received pursuant to this Order in her gross income

and Participant need not do so. For purposes of Section 72 and Section 402(a)(1) of the Internal Revenue code, the Alternate Payee and not the Participant shall be treated as the distributee of any distribution or payment made to her by the Plan pursuant to this Order.

14. To the extent that this Order is inconsistent or in conflict with applicable regulations to be enacted by the United States Labor or Treasury Department, the Order shall be null and void.

15. The Court retains jurisdiction over this matter to clarify or amend this Order if necessary to establish or maintain its qualifications as a QDRO under the Retirement Equity Act of 1984 to establish or maintain Alternate Payee's right to receive benefits under the Plan.

16. Copies of this Order shall be sent by ordinary mail to Plan Administrator, DuPont Legal, D-7033, 1007 Market Street, Wilmington, Delaware, 18898.

17. The Plan Administrator shall promptly notify the Participant, the alternate Payee, and their attorneys of the receipt of a copy of this Order and the Plan's procedures for determining the qualified status of domestic relations orders, and within a reasonable period of time after receipt of a copy of this Order, determine whether this Order is a qualified domestic relations order and notify the Participant and the Alternate Payee of such determination.

SIGNED the 3 day of December, 1997.

/s/ Monte D. Lawlis
~~JOE BOB GOLDEN~~ Monte D. Lawlis
JUDGE PRESIDING

NO. 16.352

IN THE MATTER OF THE MARRIAGE OF	**§ IN THE DISTRICT § COURT OF**
LIV KENNEDY AND WILLIAM PATRICK KENNEDY	**§ JASPER COUNTY, § TEXAS**
AND IN THE INTEREST OF THEIR MINOR CHILD	**§ 1ST JUDICIAL § DISTRICT**

FINAL DECREE OF DIVORCE

On the 6th day of May, 1994, this case came on for hearing.

Appearances

Petitioner, **LIV KENNEDY**, Social Security Number XXX-XX-XXXX, appeared in person and through attorney of record, **BRUCE N. SMITH.**

Respondent, **W.P. KENNEDY**, Social Security Number XXX-XX-XXXX, appeared in person and through attorney of record, **A.W. DAVIS, JR.**

Record

The record of testimony was made by the Court's duly authorized court reporter.

Jurisdiction and Domicile

The Court finds that the pleadings of Petitioner are in due form and contains all the allegations,

information, and prerequisite required by law. The Court, after receiving evidence, finds that it has jurisdiction over this cause of action and the parties and that at least 60 days have elapsed since the date the suit was filed. The Court finds that Petitioner has been a domiciliary of this state for at least a six month period preceding the filing of this action and a resident of the county in which this proceeding is filed for at least a 90 day period preceding the filing of this action. All persons entitled to citation were properly cited.

Jury

A jury was waived, and all questions of fact and of law were submitted to the Court.

Divorce

IT IS ORDERED AND DECREED that Petitioner, **LIV KENNEDY**, and Respondent, **WILLIAM PATRICK KENNEDY**, be and they are hereby divorced.

Children of the Marriage

The Court finds that there are no children of the marriage under the age of 18 years, and none are expecting.

Property

The Court finds that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party.

IT IS ORDERED AND DECREED that the estate of the parties is divided as follows:

Petitioner is awarded the following as Petitioner's sole and separate property and Respondent is divested of all right, title, interest, and claim in and to such property:

1. **All monies and proceeds and interest in and from the Merril Lynch Account Account #XXX-XXXXX, said account in the names of William P. Kennedy and Liv Kennedy.**

2. **The 1983 Mercedes Benz 300SD automobile, VIN#WDBCH20A1DB047087, together with all title documents, prepaid insurance and keys.**

3. **A portion of Respondent's retirement benefits with E. I. Dupont De Nemours and Company, pursuant to the Qualified Domestic Relations Order which is attached hereto and incorporated herein for all purposes.**

4. **All household furniture, furnishings, fixtures, goods, appliances and equipment in the possession of or subject to sole control of Petitioner.**

5. All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Petitioner.

6. Any and all sums of cash in the possession of or subject to the sole control of Petitioner, including money on account in banks, savings institutions or other financial institutions, which accounts stand in Petitioner's sole name or from which Petitioner has the sole right to withdraw funds or which are subject to Petitioner's sole control.

7. Any and all sums whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit sharing plan, savings plan, employee thrift plan, employee stock ownership plan, retirement plan, pension plan, or like benefit program existing by reason of Petitioner's past, present or future employment.

8. Any and all policies of life insurance insuring the life of Petitioner or insurance policies insuring an item of personalty in the possession and control of Petitioner.

9. Any and all stocks, bonds, and securities registered in the name of Petitioner, together with all dividends, splits, and other rights and privileges in connection therewith.

Respondent is awarded the following as Respondent's sole and separate property, and Petitioner is hereby divested of all right, title, interest, and claim in and to such property:

1. The entire 401k plan with Respondent's employer, DuPont D.E. Nemours

2. The 1990 Dodge Pickup Truck, VIN# _____, together with all title documents, prepaid insurance, and keys.

3. The farm tractor.

4. All household furniture, furnishings, fixtures, goods, appliances and equipment in the possession of or subject to the sole control of Respondent.

5. All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Respondent.

6. Any and all sums of cash in the possession of or subject to the sole control of Respondent, including money on account in banks, savings institutions or other financial institutions, which accounts stand in Respondent's sole name or from which Respondent has the sole right to withdraw funds or which are subject to Respondent's sole control.

7. Any and all sums whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom,

and any other rights related to any profit-sharing plan, savings plan, employee thrift plan, employee stock ownership plan, retirement plan, pension plan, or like benefit program existing by reason of Respondent's past or present or future employment, except for that portion awarded to **LIV KENNEDY**, hereinabove.

8. Any and all policies of life insurance insuring the life of Respondent or insurance policies insuring an item of personalty in the possession and control of Respondent.

9. Any and all stocks, bonds, and securities registered in the name of Respondent, together with all dividends, splits, and other rights and privileges in connection therewith.

Confirmation of Separate Property:

IT IS FURTHER ORDERED AND DECREED that the following described property is confirmed as the separate property of Respondent, **WILLIAM PATRICK KENNEDY:**

1. The home and real property located in Hillister, Tyler County, Texas, known as **KENNEDY BROTHERS RANCH**, and same being further described as follows:

   Being out of Abstract No. 972, C.C. Young Survey, Tyler County, Texas and

being the same tract called 287 acres, conved by J.N. Jordan to Jerald M. Richardson by deed recorded in Volume 162, Page 11 of the Tyler County Deed Records, and being 259.967 acres of land more particularly described by metes and bounds as follows:

BEGINNING at ½" iron rod at the Southwest corner of said C.C. Young Survey and a [sic] the Southeast corner of the G. &B.N. Survey, Abstract No. 856 [sic] and in the North line of the H.R. Schmeid Survey, Abstract No. 779;

THENCE N 02n deg. 20' 59" W, along and with the East line of said G. & B.N. Survey and the West line of said Young Survey, 3,919.68 feet to a ½" iron rod for the Northwest corner of this tract, same being the South west corner of a 53.4 acre tract, recorded in Volume 107, Page 578 of the Deed Records of said county;

THENCE S 87 deg. 56' 10" E, along and with the South line of said 53.4 acre tract, 2,282.76 feet to a ½" Iron Rod for corner in the Westerly right-of-way line of U.S. Highway No. 69/287;

THENCE along and with Westerly right-of-way line of said Highway No. 69 as follows:

1. S 41 deg. 16' 40" E 324.81 feet to a concrete right-of-way marker;

2. S 38 deg. 27' 27" E 198.65 feet to a concrete right-of-way marker;

3. S 36 deg. 02' 00" E 100.26 feet to a concrete right-of-way marker;

4. S 37 deg. 48' 34" E 194.16 feet to a concrete right-of-way marker;

5. S 49 deg. 31' 54" E 101.49 feet to a concrete right-of-way marker;

6. S 46 deg. 51' 67" E 102.50 feet to a concrete right-of-way marker;

7. S 41 deg. 22' 49" E 983.28 feet to a concrete right of way marker for the point of curvature in said Highway;

8. Along and with a curve to the right, having a delta angle of 06 deg. 28' 26" a radius of 2,804.79 feet, and a chord bearing and distance of S 36 deg. 06' 52" E 316.75 feet to a concrete right-of-way marker and the end of said curve;

9. S 26 deg. 28' 50" E 97.75 feet to a concrete right-of-way marker;

10. S 26 deg. 26' 25" E 87.51 feet to a concrete right-of-way marker;

11. S 28 deg. 00' 47" E 99.50 feet to a concrete right-of-way marker;

12. S 29 deg. 27' 09" E 96.50 feet to a concrete right-of-way marker;

13. S 29 deg. 07' 57" E 100.63 feet to a concrete right-of-way marker for a point of curvature of said Highway;

14. Along and with a curve to the right, having a delta angle of 06 deg. 40' 23", a radius of 2,804.79 feet, and a chord bearing and distance of 6.20 deg. 00' 04" E 331.37 feet to a concrete right-of-way marker for the point of tangency in said Highway;

15. S 16 deg. 18' 07" E 261.85 feet to a concrete right-of-way marker;

16. S 12 deg. 09' 23" E 201.11 feet to a concrete right-of-way marker;

17. S 16 deg. 111 24" E 299.11 feet to a concrete right-of-way marker;

18. S 25 deg. 57' 37" E 31.78 feet to a ½" Iron Rod for the Southeast corner of this tract in the South line of said Young Survey and in the North line of the I. & G.N. R.R. Survey, Abstract No. 720.

THENCE N 89 deg. 35' 27" W, along and with the South line of the Young Survey and the North line of said I. & G.N. R.R. Survey, at approximately 3,700 feet pass the Northwest corner of said I & G.N. R.R. Survey and the Northeast corner of the aforementioned H.R. Schmeid Survey and continuing with the common line between the Schmeid & Young Survey a total distance of 4,201.97 feet to

the place of **BEGINNING** containing 269.967 acres of land.

2. The real property located in Fawil, Newton County, Texas, being further described as follows:

BEING the same land conveyed to G.R. Stark by C.B. Rogers (Vol. 89, page 429) (Vol. 11, page 75), in the Lewis Denning Survey, Abst. 98, situated at Newton County, Texas, and described as follows:

BEGINNING at a corner fence post for corner, the N W C of said Stark's cultivated fleid [sic], on the W L of said Denning Survey, from which a Pine Stamp brs. N 31 ½ E – 7 vrs. and a 3" S. Q. hrs. N 59 deg. 10' E. – 7.4 vrs, said beginning corner being 229.5 vrs. S. 4 E. of the N E C of the G. W. Davis 72.4 acre tract from which a 14" Pine Stump brs. N. 74-¾ E. – 11.8 vrs., and a 20" Do. brs. N 26 ½ E. – 11 vrs.

THENCE along a wire fence, and the W L. of said Denning Survey, S. 4 E. at 332 vrs. to a corner fence post for corner from which a 7" Pine brs. S. 18 deg. 10' E. – 7.1 vrs., and a 7" Do. brs. S. 14-¾ E. – 10.2 vrs.

THENCE along a wire fence, N. 69 ½ E. at 313.7 vrs. to a corner fence post for corner, from which a 22" R. O. brs. S. 59 deg. 20' E. – 10.5 vrs., and a 10" Hickory brs. N. 0 deg. 15' E. – 13.4 vrs.

THENCE along a wire fence N. 17 ½ W. at 253 vrs. to a corner fence post for corner,

from which a 12" Post Oak brs. N. 1 ½ W. – 14.6 vrs. and a 16" Do. brs. N. 58 deg. 40' E. 22.4 vrs.

THENCE along a wire fence, S. 85 ¼ W. st 230 vrs. to the place of beginning containing 14 acres of land more or less.

3. All mineral rights interest in the property located in Louisiana.

4. Kennedy Bros. Ranch acct., Community Bank, Woodville, Tx.

Provisions Dealing With The Sale of Home:

IT IS ORDERED AND DECREED that the property and all improvements located thereon at xxxxx, xxxxx, xxxxx, xx, or being further described as follows:

(1) BEING 41.35 acres, Abstract 589, H&TC Section 32, Jasper County, Texas;

(2) BEING 80.00 acres, Abstract 583, H&TC Section 32, Jasper County, Texas, and all of Blocks 12 & 13, Southwestern Settlement & Development Corporation Farm Subd. #1, as recorded in Volume 50, Page 425, of the Deed Records of Jasper County, Texas;

shall be place [sic] on the market and sold at a fair market value as follows:

1. The parties shall list the property with a duly licensed real estate broker having sales experience in the area where the property is located, provided

further that such real estate broker shall be an active member in the Multiple Listing Service with the Beaumont Board of Realtors.

2. The property shall be sold at a price that is mutually agreeable to Petitioner and Respondent. Should Petitioner and Respondent be unable to agree on a sales price, upon the application of either party to this suit, the property shall be sold under such terms and conditions as determined by a court-appointed receiver.

3. Respondent shall reside in the home until the home is sold. Both Petitioner & Respondent shall be equally responsible for the payment of yearly taxes, and insurance on the home until the time that the home is sold. All maintenance and repairs necessary to keep the property in its present condition shall be paid equally by Petitioner and Respondent. Both Petitioner and Respondent shall be equally responsible for yard maintenance on the home until the time that the home is sold.

4. The net sales proceeds are defined as the gross sales price less costs of sale and full payment of any mortgage indebtedness or liens on the property. **IT IS ORDERED** that the proceeds shall be distributed as follows. **LIV KENNEDY** shall receive the sum of $24,500.00. Then the remaining proceeds shall be divided as follows: **LIV KENNEDY** shall receive one-half of the remaining proceeds; and **WILLIAM PATRICK KENNEDY** shall receive the remaining one-half of the proceeds.

5. **IT IS FURTHER ORDERED** that all sums remaining in the escrow account upon sale of said property shall be equally divided between the parties with Petitioner receiving one-half of said escrow account and Respondent receiving one-half of said escrow account.

Provisions for Dealing with Sale of Household Furnishings:

IT IS ORDERED AND DECREED that the household furnishings located at xxxxx, xxxxx, xxxxx, xx, shall be place [sic] on the market and sold at a fair market value as follows:

1. The parties shall list the property with a duly licensed broker having sales experience.

2. The property shall be sold at a price that is mutually agreeable to Petitioner and Respondent. Should Petitioner and Respondent be unable to agree on a sales price, upon the application of either party to this suit, the property shall be sold under such terms and conditions as determined by a court-appointed receiver.

3. The net sales proceeds are defined as the gross sales price less costs of sale and full payment of any mortgage indebtedness or liens on the property. **IT IS ORDERED** that the proceeds shall be distributed as follows. **LIV KENNEDY** shall receive one-half of the proceeds; and **WILLIAM PATRICK KENNEDY** shall receive one-half of the proceeds.

Debts

IT IS ORDERED AND DECREED that Petitioner shall pay, as a party of the division of the estate of the parties, the following debts and obligations, and shall indemnify and hold Respondent harmless from any failure to so charge these debts and obligations:

1. One half of the income tax liability for the tax year 1993, and one-half amount being defined as $4,155.00.

2. Any and all debts, charges, liabilities, and other obligations incurred solely by Petitioner from and after May 24, 199[illegible], unless express provision is made in this decree to the contrary.

IT IS ORDERED AND DECREED that Respondent shall pay, as a part of the division of the estate of the parties, the following debts and obligations, and shall indemnify and hold Petitioner harmless from any failure to so discharge these debts and obligations.

1. One-half of the income tax liability for the tax year 1993, said one-half amount being defined as $4,155.00.

2. Any and all debts, charged, liabilities, and other obligations incurred solely by Respondent from and after May 24, 1993, unless express provisions is made in this decree to the contrary.

Court Costs

All costs of court expended in this cause are taxed against the party incurring the costs, for which let execution issue.

Clarifying Order

Without affecting the finality of this Decree of Divorce, this Court expressly reserves the right to make orders necessary to clarify and enforce this decree.

Execution of Documents

IT IS ORDERED AND DECREED that each party shall execute any and all instruments necessary to effect this Decree and that Petitioner and Respondent shall have all appropriate and necessary writs, execution and process, as many and as often as is necessary to accomplish the execution and final disposition of this judgment.

Relief Not Granted

IT IS ORDERED AND DECREED that all relief requested in this cause and not expressly granted is denied.

Date of Judgment

SIGNED on June 2, 1994.

FILED
at 8 o'clock A M
JUN 3 1994
NELL POWERS
District Clerk
[Illegible]
By /s/ [Illegible]

/s/ Monte D. Lawlis
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

/s/ Bruce N. Smith
BRUCE N. SMITH
ATTORNEY FOR PETITIONER

/s/ A.W. Davis, Jr.
A.W. DAVIS, JR. By Gary H. Gatlin
ATTORNEY FOR RESPONDENT

APPROVED AS TO FORM AND CONTENTS:

/s/ Liv Kennedy
LIV KENNEDY-PETITIONER

/s/ William Patrick Kennedy
WILLIAM PATRICK KENNEDY-
RESPONDENT

29 U.S.C.A. § 1056. Form and payment of benefits

(d) Assignment or alienation of plan benefits

* * *

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with

the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph –

(i) the term "qualified domestic relations order" means a domestic relations order –

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which –

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order –

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such

order requires that payment of benefits be made to an alternate payee –

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" means the earlier of –

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order –

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan –

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures –

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v) –

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in –

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 1673(a) of Title 15.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if –

(A) the order or requirement to pay arises –

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle [section 1101 et seq. of this title], or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle [section 1101 et seq. of this title] by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 1055 of this title apply with respect to distributions from the plan to the

participant, if the participant has a spouse at the time at which the offset is to be made –

(i) either –

(I) such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 1055(c)(2)(B) of this title), or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 1055(c) of this title,

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle, or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 1055(a)(1) of this title and under a qualified preretirement survivor annuity provided pursuant to section 1055(a)(2) of this title, determined in accordance with paragraph (5).

A plan shall not be treated as failing to meet the requirements of section 1055 of this title solely by reason of an offset under this paragraph.

(5)(A) The survivor annuity described in paragraph (4)(C)(iii) shall be determined as if –

(i) the participant terminated employment on the date of the offset,

(ii) there was no offset,

(iii) the plan permitted commencement of benefits only on or after normal retirement age,

(iv) the plan provided only the minimum-required qualified joint and survivor annuity, and

(v) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(B) For purposes of this paragraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 1002(23) of this title) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

* * *

29 U.S.C.A. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and

the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

> **(i)** such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
>
> **(ii)** no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the

investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of –

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon –

(A) the earlier of –

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which –

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if –

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant –

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the

absence of any investment election by the participant, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement –

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement –

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection –

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

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29 U.S.C.A. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress

such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), or (8) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor –

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection

(a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if –

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of

this title, section 1021(e)(1) of this title or section 1021(f), or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 1021 of this title or 1082(b)(7)(F)(vi) of this title, or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per

request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day –

> **(A)** for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer which is in endangered or critical status, or
>
> **(B)** in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate

enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State

courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of –

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the

Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

OPPOSITION BRIEF

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(2)

No. 07-636

FILED
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SUPREME COURT, U.S.

In The Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

v.

E. I. DU PONT DE NEMOURS AND COMPANY AND PLAN ADMINISTRATOR FOR DU PONT SAVINGS AND INVESTMENT PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Under ERISA, benefits provided under a pension plan cannot be assigned or alienated. 29 U.S.C. § 1056(d)(1). An express exception to this prohibition exists where a state domestic relations order is submitted to the plan and meets ERISA's detailed requirements of a Qualified domestic Relations Order ("QDRO"). 29 U.S.C. § 1056(d)(3)(A).

The narrow question presented in this case is whether the court of appeals was correct in holding that ERISA's anti-alienation provision bars the use of a state divorce decree, which is not a QDRO, to reassign pension plan benefits to participant's estate upon his death.

2. Whether both courts below erred in denying an award of attorney's fees to petitioner under ERISA pursuant to a five-factor test that has been adopted by every circuit to consider the issue and does not present a conflict among the circuits warranting this Court's review.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent E. I. du Pont de Nemours and Company states that it has no parent corporations and that there are no publicly held companies that own more than ten percent of its stock.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTION

This case involves a very narrow issue of the application of ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), which bars the direct or indirect alienation of pension benefits subject to ERISA. Specifically, the court below found that the anti-alienation provision prohibited a pension plan from treating a state divorce decree that is not a QDRO as a waiver of pension benefits of a spouse.

Each employee benefit plan covered by ERISA is classified as either a pension plan or a welfare plan. 29 U.S.C. § 1002(1), (2). ERISA's anti-alienation provision applies *only* to pension plans; it does not apply to life insurance and other welfare plans. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836-37 (1988). The parties agree that the DuPont Savings and Investment Plan ("SIP") at issue here is a pension plan and is therefore subject to ERISA's anti-alienation provision. Petitioner urges the Court to grant her petition to resolve what she contends is a division of authority on whether ERISA's anti-alienation provision prohibits a pension plan from giving effect to a beneficiary's divorce court order regarding the beneficiary's right to benefits under the pension plan.

Most of the cases that Petitioner invokes to support her assertion that there is a circuit split on this issue involve life insurance and other welfare

plans that are not subject to ERISA's anti-alienation provision. Although Petitioner also refers to circuit court cases involving pension plans, only two of them hold that the anti-alienation provision does not bar a pension plan from giving effect to a waiver by a beneficiary. Both decisions were based on the view that ERISA's anti-alienation provision did not apply to a waiver by a pension plan beneficiary. However, that view was superseded by the Court in *Boggs v. Boggs*, 520 U.S. 833, 846 (1997), which made clear that ERISA's anti-alienation provision applies to beneficiaries as well as to participants under pension plans.

ERISA allows benefits to be paid only to participants or their beneficiaries.[1] Specifically, ERISA § 403(c) requires that assets of the plan be used only for those purposes and for the payment of plan expenses. 29 U.S.C. § 1103(c). Furthermore, the Act requires the administrator-fiduciary to act solely for the benefit of the participants and their beneficiaries. 29 U.S.C. § 1104(a)(1)(A)(i); *Cent. States, Southeast*

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[1] The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. 29 U.S.C. § 1002(7). A "beneficiary" is a person designated by the participant or by the terms of the plan. 29 U.S.C. § 1002(8).

and Southwest Areas Pension Fund. v. Cent. Transp., Inc., 472 U.S. 559, 571 (1985).

STATEMENT

The Estate of William Patrick Kennedy ("Estate") seeks review of a final decision of the Fifth Circuit that ERISA's anti-alienation provision applied and that because ERISA includes detailed, careful, and comprehensive provisions for changing the beneficiaries under a pension plan – provisions that were not invoked by the parties in this case – there was no basis for creating a federal common-law rule to address an issue that Congress had already addressed in ERISA. The court of appeals also concluded that while a Qualified Domestic Relations Order ("QDRO"), 29 U.S.C. § 1056(d)(3)(B)(i), provided a means of effecting a waiver, none was filed for the SIP benefits.

Decedent, William Kennedy, was a DuPont employee and participated in its SIP. There is no dispute that the SIP is an "employee pension benefit plan," as defined by ERISA. 29 U.S.C. § 1002(2). (Pet. App. 37). In 1971, during his DuPont employment, decedent married Liv Kennedy. Decedent signed beneficiary-designation forms in 1974, identifying Liv Kennedy as the SIP's sole beneficiary. Decedent did not name a contingent beneficiary. (Pet. App. 2).

Decedent and Liv Kennedy divorced in 1994. Pursuant to the decree, Liv Kennedy agreed to be

divested of "all right, title, interest, and claim in and to . . . the proceeds therefrom, and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [decedent's] . . . employment." (Pet. App. 64-65). In 1997, a QDRO was approved by the state divorce court. It provided benefit disbursement instructions for some of decedent's non-SIP employee benefit plans. (Pet. App. 54). No QDRO for the SIP, however, was ever submitted. Both William and Liv Kennedy were represented by counsel.

Decedent retired from DuPont in 1998 and died in 2001. Although permitted to do so, decedent never executed any documents replacing or removing Liv Kennedy as the SIP beneficiary. (Pet. App. 3).

Kari Kennedy, the daughter of the decedent and Liv Kennedy, was appointed executrix of decedent's estate. By letter to DuPont, the Estate demanded the SIP funds be distributed to the Estate, claiming the beneficiary designation of Liv Kennedy was invalid. DuPont refused, relying on the SIP beneficiary designation. The Estate also requested Liv Kennedy to relinquish her SIP interest. She did not do so; instead, pursuant to requests to DuPont, Liv collected the SIP balance (approximately $400,000). (Pet. App. 3, 33).

The Estate filed this action, seeking to recover the SIP benefits by presenting an ERISA claim, under 29 U.S.C. § 1132(a)(1)(B), and a state-law breach-of-contract claim. The Estate basically claimed that Liv

Kennedy had waived her rights to the SIP benefits through the divorce decree, thus invalidating the SIP beneficiary designation, and that DuPont incorrectly distributed the SIP benefits.[2] (Pet. App. 3).

The district court, *inter alia*, granted summary judgment for the Estate on its ERISA claim, holding that the Estate was entitled to the value of the SIP benefits existing at the time of decedent's death, and for DuPont on the Estate's breach-of-contract claim, holding it was preempted by ERISA. (Pet. App. 52).

In awarding summary judgment to the Estate, the district court concluded, *inter alia*, that federal common-law applied to determine whether Liv Kennedy's executing the divorce decree waived her right to the SIP benefits, and that under federal common-law, the divorce decree constituted a valid waiver.

The district court denied DuPont's subsequent motion for judgment as a matter of law or, alternatively, a new trial. Also denied was the Estate's ERISA-based motion for attorney's fees.

The court of appeals reversed the district court's holding that there was a common-law waiver of pension benefits by Liv Kennedy. A unanimous panel of the Fifth Circuit held that ERISA's anti-alienation

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[2] DuPont filed a third-party claim against Liv Kennedy, asserting that, in the event she was not the correct beneficiary, the SIP was entitled to return of the SIP benefits. This claim was settled without any recovery to the SIP.

provision, 29 U.S.C. § 1056(d)(1), controlled because the benefits involved were pension benefits to which that provision specifically attached and that Liv Kennedy's "waiver" was an impermissible "assignment or alienation" within the meaning of the applicable Treasury Department regulations. (Pet. App. 8-9). The court concluded that there was no statutory gap that may allow a resort to a common-law theory of waiver. (Pet. App. 7). The court also concluded that the explicit exceptions to the anti-alienation provision for a QDRO did not apply here because the plan participant and beneficiary did not seek to obtain a QDRO for the SIP benefit. (Pet. App. 11).

The court of appeals also affirmed the district court's decision not to award attorney's fees to the Estate, finding that the district court had applied the correct standard and had not abused its discretion. (Pet. App. 11-14).

REASONS FOR DENYING THE PETITION

I. THERE IS NO DIVISION OF AUTHORITY ON WHETHER ERISA'S ANTI-ALIENATION PROVISION BARS A BENEFICIARY'S WAIVER OF PENSION PLAN BENEFITS.

A. The very narrow ground on which the court of appeals decided this case does not create or add to a split of authority among the courts of appeals nor does it present a question requiring a decision by this Court. In the present case, the Fifth Circuit correctly

held that the anti-alienation provision of ERISA controls and prohibits resort to a federal common-law waiver in pension benefit cases.[3] The court noted that although ERISA provides for an exception to such a prohibition through the device of obtaining a QDRO, the parties to the divorce never sought such an order for the SIP benefits at issue here. (Pet. App. 11). The Fifth Circuit's decision is consistent with the text of ERISA's anti-alienation provision, the applicable Treasury Department regulations, and this Court's precedent.[4]

There is no present division of authority among the courts of appeals as to the application of the statutory mechanism employed by the Fifth Circuit in the instant case. Petitioner relies on two out-dated decisions by the Seventh and Fourth Circuits which took the position that the ERISA anti-alienation provision did not apply to beneficiaries of a pension plan in connection with the dissolution of a marriage. (Pet. 10). However, those decisions were prior to this Court's decision in *Boggs*, 520 U.S. at 851-52, which applied the anti-alienation provision to pension plan beneficiaries.

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[3] In that the anti-alienation provision applies to more than domestic relations orders, the issue presented here is exceedingly narrow. *See Mackey*, *supra*.

[4] Petitioner cites to an IRS General Counsel Memorandum as authority. (Pet. 25-26). However, an internal memorandum may not be used or cited as precedent. *See* 26 U.S.C. § 6110(j)(3); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 279 n.2 (7th Cir. 1990) (en banc).

In *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 279 (7th Cir. 1990) (en banc), the Seventh Circuit found that ERISA's anti-alienation provision did not apply to a non-participating spouse's pension benefit where the waiver was given in connection with the dissolution of their marriage. The Fourth Circuit in *Estate of Altobelli v. Int'l Bus. Mach. Corp.*, 77 F.3d 78, 81 (4th Cir. 1996), adopted the Seventh Circuit's approach that the anti-alienation clause does not apply to beneficiaries. The *Altobelli* Court proceeded to apply a common-law theory of waiver to find that a former wife had given up her pension benefits under a marital settlement agreement that had been incorporated into the state divorce decree. *Id.* at 81-82.

Fox Valley and *Altobelli* do not reflect current law. Since this Court in *Boggs* settled that the anti-alienation clause *does* apply to beneficiaries, the Seventh and Fourth Circuits have not revisited or reaffirmed their prior opinions as to the applicability of the anti-alienation provision to beneficiaries, such as Liv Kennedy in this case.

Petitioner also maintains (Pet. 24, 25) that this decision is contrary to earlier Fifth Circuit decisions. However, the cases cited by Petitioner do not involve waivers in conjunction with martial dissolutions. Further, Petitioner never sought re-hearing before the Fifth Circuit to resolve this perceived conflict.

No reported decision of any circuits that have considered the application of the anti-alienation and

QDRO provisions of ERISA have found contrary to the decision before this Court. Far from creating or adding to a split of authority among the circuits, the Fifth Circuit's opinion in this case finds substantial support from a recent opinion of the Third Circuit in *McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1118 (2007). There, a retiree sought declaratory relief to direct the employer's benefit plan to recognize his former wife's waiver of beneficiary rights. The court of appeals dismissed the retiree's action finding that ERISA's anti-alienation provision applied to bar a waiver by the former wife and noted that a QDRO had not been filed. *Id.* at 250.

Petitioner's reliance on state jurisprudence is equally unavailing. Petitioner relies on state court decisions involving facts and ERISA provisions markedly different from the present case. Petitioner claims at some length that *Kennedy* conflicts with the Texas Supreme Court's decision in *Keen v. Weaver,* 121 S.W.3d 721 (Tex. 2003). (Pet. 27-32). Petitioner is badly mistaken. There is no conflict between the two decisions.

Keen involved a claim by a pension plan participant's former wife to the surviving spouse benefits that ERISA requires to be provided to the surviving spouse of a married participant. Although the participant's former wife executed a waiver in connection with the divorce, and although the court relied on the waiver in reaching its decision, the waiver was entirely beside the point: the participant in *Keen* had

subsequently remarried, and ERISA's surviving spouse provisions treat only the participant's spouse at the time of the participant's death (the second wife in *Keen)* as the participant's surviving spouse. As a result, *regardless of the waiver*, the former wife had no right to surviving spouse benefits under the pension plan.[5] There is thus no conflict between the outcome in *Keen* and the outcome in this case,[6] and the Court should not grant certiorari on the basis of Petitioner's claim that the Fifth Circuit's decision in this case conflicts with the decision in *Keen*.[7]

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[5] Under ERISA's surviving spouse provisions, where a participant dies before his benefits are paid or begin to be paid, the participant's spouse on the date of the participant's death is the spouse who is entitled to receive the surviving spouse benefits, subject to a limited number of exceptions (*e.g.*, where the spouse and the participant have been married for less than a year, where a QDRO provides otherwise, or where the spouse consents to the participant's designation of someone else as the beneficiary). *See* 29 U.S.C. § 1055; 26 C.F.R. §§ 1.401(a)-11 and 1.401(a)-20, Q&A-25-31; S. Rep. No. 575, 98th Cong., 2d Sess. 11-18 (1984).

[6] If the Texas courts are faced in the future with a case like this one, where the divorced participant does *not* remarry, it is likely that the Texas courts will follow the Fifth Circuit's decision in this case. In *Keen*, the Texas Supreme Court relied heavily on Fifth Circuit decisions. *See Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000); *Clift v. Clift*, 210 F.3d 268 (5th Cir. 2000); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994). *Keen* also relied on a number of other courts' decisions that are now obsolete as a result of *Boggs*.

[7] Other state court cases cited by Petitioner (Pet. 10) are also inapplicable. For example, *MacInnes v. Rowley*, 677 N.W. 2d 889 (Mich. CV. App. 2004) (welfare benefits case to

(Continued on following page)

In the final analysis, not only is the decision by the Fifth Circuit not part of a split of authority among the circuits, but also the case was rightly decided. Petitioner does not dispute that the SIP is a pension plan, that ERISA's anti-alienation provision applies to the SIP and its beneficiaries, that Liv Kennedy was decedent's sole beneficiary under the SIP, and that decedent never replaced Liv as his beneficiary under the SIP. (Pet. at 2-3). Petitioner acknowledges that the divorce decree is a domestic relations order within the meaning of § 1056(d)(3)(B)(ii) and that although the divorce court issued a QDRO, the QDRO did not apply to the SIP. (Pet. at 3-4).

Although ERISA exempts QDROs from the anti-alienation provision, ERISA provides that if a domestic relations order is determined *not* to be a QDRO the plan *must* pay the benefit in question to the person who would have been entitled to receive the benefit in question if there had been no order. *See* 29 U.S.C. § 1056(d)(3)(H)(iii). Petitioner has acknowledged that the divorce court's order was not a QDRO. Thus, the QDRO provisions did not merely prohibit the SIP from giving effect to the divorce order; they also *required* the SIP to distribute decedent's account balance to decedent's designated beneficiary.

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which anti-alienation provision does not apply); *Strong v. Omaha Constr. Ind. Pension Plan*, 701 N.W. 2d 320 (Nebr. 2005) largely ignoring the anti-alienation provision).

There are three alternative approaches that the parties could have taken to assure that the SIP death benefit would be paid to someone other than Liv Kennedy:

- The parties could have asked the divorce court to issue a QDRO directing the SIP to pay decedent's account balance to one or more alternate payees;
- At any time during the roughly seven-year period between the divorce and decedent's death, decedent could have designated someone else as his beneficiary under the SIP; or
- Before the date of the divorce, if decedent had been able to obtain his wife's consent, decedent could have designated someone else as his beneficiary under the SIP.

Liv Kennedy's status as decedent's beneficiary under the SIP following the divorce was thus not the result of a "gap" in the statute; it was due to the parties' failure to take any of the approaches that ERISA offered them. In the absence of a gap in the statute, there is no justification for formulating a common-law rule, as Petitioner proposes, and no need for the Court to grant the petition for a writ of certiorari.

B. In an effort to show that this case is worthy of review, Petitioner attempts at some length (Pet. 9-12) to construct a series of conflicts among the

circuits. Although conflicts do exist, that division of authority does not affect the narrow holding of the Fifth Circuit in this case.[8]

More specifically, the courts have developed two theories to deal with a claim of waiver of benefits by a designated beneficiary. One theory addresses whether ERISA authorizes courts to adopt common-law rules that give effect to a waiver of benefits if the waiver meets certain requirements, including specificity, voluntariness, and good faith. *See, e.g., Manning v. Hayes*, 212 F.3d 866, 874 (5th Cir. 2000); *Clift v. Clift*, 210 F.3d 268, 271 (5th Cir. 2000); *Fox Valley*, 897 F.2d at 281.

The other theory is usually called the "plan documents" approach, which requires *all* employee benefit plans to be administered in accordance with the terms of the plan and the forms on file with the administrator. Thus, no alteration of beneficiaries would be permitted except in accordance with terms of the plan and not by other documents such as private agreements between participants and beneficiaries. *See, e.g., McMillan v. Parrott*, 913 F.2d 310

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[8] In his amicus brief upon invitation from this Court in *McGowan*, the Solicitor General did not sufficiently focus on the difference between welfare and pension cases and their relation to the anti-alienation provision in concluding that there is a split of authority among the circuits.

(6th Cir. 1990); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993).[9]

In the case at bar, the Fifth Circuit did not need to resort to either of these theories because it based its decision exclusively on the anti-alienation provision. Since a QDRO was prepared and submitted to the state court in the divorce proceedings but did not cover the SIP, the court of appeals reasoned that the alienation or waiver of beneficiary rights was statutorily barred. Finding no gap in the statutory regime, there was no need to resort to either the waiver theory or the plan documents approach.

Indeed, the Fifth Circuit emphasized that prior Fifth Circuit decisions that adopted the other theories were simply inapposite because they involved welfare benefits to which the anti-alienation provision of ERISA does not apply. (Pet. App. 5-6) Thus, any case involving welfare benefits is not in conflict with the ruling below on pension benefits.[10]

The anti-alienation provision applies only to pension benefits and not to welfare benefits. Therefore,

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[9] In the event this Court grants certiorari DuPont would argue, in the alternative, that it also should prevail under this "plan documents" approach.

[10] Most of the cases to which the anti-alienation provision was not applicable involved insurance disputes, as noted by the Fifth Circuit. (Pet. App. 5-6). *See also, Krishna, supra*; *Metro. Life Ins. Co. v. Pettit*, 164 F.3d 857 (4th Cir. 1998); *Metro. Life Ins. Co. v. Pressley*, 82 F.3d 126 (6th Cir. 1996); *Metro. Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991).

any case involving welfare benefits is fully outside the scope of the anti-alienation and QDRO provisions that are the basis of the Fifth Circuit's decision in this case.

The difference of opinion among the circuits as to the correct analysis of a beneficiary's waiver of benefits may be necessary in a future case that presents the correct factual context for its resolution. However, the instant case is not an appropriate vehicle to resolve any such division of authority on common-law theories of waiver. In this case, the Fifth Circuit simply did not choose between these different theories but rather based its decision solely on the anti-alienation provision that applies only to pension plans.

II. THERE IS NO DIVISION OF AUTHORITY REGARDING THE STANDARD GOVERNING ATTORNEY'S FEE AWARDS IN ERISA CASES.

There is no circuit split regarding the standard governing the award of attorney's fees in ERISA cases. Petitioner's argument to the contrary (Pet. 36-37) relies upon overruled authority and is completely wrong.

In deciding whether to grant the Estate attorney's fees, both the district court (Pet. App. 23) and the court of appeals (Pet. App. 12) applied a five-factor test set out by the Fifth Circuit in *Iron Workers*

Local No. 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980).[11]

Petitioner argued in both the district court and the court of appeals that the five-factor test was the correct test. Now, for the first time, Petitioner challenges the use of the five-factor test, and claims that there is a division of authority on this point among the courts of appeals. Petitioner has waived that argument.

Petitioner argues that the courts of appeals view the standard governing the award of attorney's fees in ERISA cases in two distinct ways. (Pet. 35-36). Petitioner claims that some circuits utilize the five-factor test first developed in *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978) (same five-factor test later adopted by the Fifth Circuit in *Bowen*, *supra*). (Pet. 35-36), while other circuits utilize the standard applied in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1978. (Pet. 36). Under the Civil Rights Fees Act, attorney's fees are to be

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[11] The five factors are:

1) degree of culpability or bad faith;

2) ability to satisfy an award;

3) deterrence value;

4) whether plaintiff sought to benefit all parties to the ERISA plan or to resolve a significant legal question regarding ERISA;

4) relative merits of parties' positions.

(Pet. App. 23).

awarded to a prevailing party unless special circumstances would render the award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Petitioner urges the adoption of the standard used in civil rights cases to ERISA cases, stating that the civil rights standard is "more consistent with ERISA's purposes" than the five-factor test. (Pet. 37). In support of this argument, Petitioner relies on the Eighth Circuit's decision in *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980), and the Ninth Circuit's decision in *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984), categorizing these cases as the side which utilizes the civil rights standard. (Pet. 36-37).

However, Petitioner is grossly misguided. The Eighth Circuit overturned *Landro* in *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 972 (8th Cir. 2002) (en banc), and now currently applies the *Eaves* five-factor test. *See also, Starr v. Metro Sys., Inc.*, 461 F.3d 1036, 1041 (8th Cir. 2006) (recent case following *Martin* and applying five-factor test).[12]

In *Martin*, the Eighth Circuit stated that while, in *Landro*, it was the first circuit to apply the civil rights standard to an ERISA case, it now agreed, for many reasons, "with the overwhelming majority of circuits that have considered this issue and concluded

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[12] Petitioner also heavily relies on two student-written law review comments and an article written for a business publication by two lawyers, all of which pre-date *Martin*. (Pet. 36, 37).

that the presumption should not be employed in ERISA cases." *Martin*, 299 F.3d at 971-72. The Eighth Circuit found that the five-factor test best facilitated the exercise of the district court's discretion, and "overrule[d] *Landro's* holding to the contrary." *Id.* at 972. Consequently, Petitioner's argument rests largely on an overruled decision.

The Ninth Circuit has always applied the five-factor test, *see Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452-53 (9th Cir. 1980),[13] and did so even in *Smith*. In *Smith*, the Ninth Circuit also decided to incorporate the civil rights standard on top of the five-factor test, while noting that the five-factor test still applied. *Smith*, 746 F.2d at 589-90 (holding that the *Hummell* five-factor test applies, but should be taken in light of remedial purpose of ERISA); *see also McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1172 (9th Cir. 1999) (noting that the Ninth Circuit applies the five-factor test and also applies the special circumstances rule used in civil rights cases).

However, *Smith*, which was the genesis of the civil rights standard "overlay" on the five-factor test in the Ninth Circuit, relied exclusively on the subsequently overruled decision in *Landro* as authority for

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[13] *Hummell* was the first case in which the Ninth Circuit considered the award of attorney's fees in an ERISA case. The court determined that the Fifth and Tenth Circuits in *Bowen*, 624 F.2d 1255 and *Eaves*, 587 F.2d 453, respectively, were correct in using the five-factor test as a guideline for the district courts and consequently adopted that standard. *Hummell*, 634 F.2d at 450.

superimposing the civil rights standard on top of the five-factor test. *Smith*, 746 F.2d at 589. It is noteworthy that the Ninth Circuit has, on occasion, also applied the five-factor test without incorporating the civil rights standard. *See, e.g., Tingey v. Pixley-Richards West, Inc.*, 958 F.2d 908 (9th Cir. 1992).

Consequently, contrary to Petitioner's argument (Pet. 35-39), every court of appeals, including the Eighth and the Ninth Circuits, employs some version of the five-factor test.[14] Accordingly, there is no circuit split, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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[14] *See Sullivan v. Randolph*, 504 F.3d 665, 670 (7th Cir. 2007), and *Martin*, *supra* (collecting authorities).

REPLY BRIEF

81

(3)

No. 07-636

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In The
Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

versus

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REASONS FOR GRANTING THE PETITION

I. The circuits and state supreme courts are divided – and dividing further – about whether federal common law or only plan-documents control the determination of whether an ex-spouse's voluntary divorce-decree waiver of pension benefits trumps ERISA's anti-alienation provision

On page 6 of its Response, DuPont stoutly avers that "there is no division of authority on whether ERISA's anti-alienation provision bars a beneficiary's waiver of pension plan benefits." Like a bold shout that the sun rises in the west, DuPont's argument commands attention. Contrary to DuPont's argument, there *is* a circuit split – one that is pervasive and persistent. *See* Fifth Circuit Opinion at App. 7-8, referencing *Altobelli v. International Bus. Machs. Corp.*, 77 F.3d 78, 81 (4th Cir. 1996) and *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 279 (7th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 820 (1990). *Cf.* District Court Opinion at App. 37-45.

DuPont says that the Fourth and Seventh Circuits in *Altobelli* and *Fox Valley* would have reached different decisions if they had to address Early Retirement Income Security Act ("ERISA") waiver issues after this Court's decision in *Boggs v. Boggs*, 520 U.S. 833 (1997). In *Boggs*, this Court held that ERISA pre-empted a one-size-fits-all Louisiana community property statute that allowed an ex-wife

to assign her ex-husband's benefits. *Id.* at 837. That case does not apply here.

The Fifth Circuit's decision in *Rhoades v. Casey*, 196 F.3d 592, 599 (5th Cir. 1999), shows that DuPont's argument about *Boggs* is either hyperbolic or disingenuous. As explained in *Rhoades*, most courts do not read *Boggs* to govern a knowing, voluntary waiver executed by *both* the plan participant *and* the beneficiary. *Id.* at 600. The Fifth Circuit recognized an exception to the anti-alienation provision other than a Qualified Domestic Relations Order ("QDRO"). After citing *Boggs*, *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992) and *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 455 (7th Cir. 1991), the Fifth Circuit ruled as follows:

> [T]he anti-alienation provision of ERISA is not absolute. Courts, including this one, have noted that there is an exception to ERISA's anti-alienation provision for a knowing and voluntary waiver of retirement benefits that is executed to reach a settlement . . . [citations omitted].

Rhoades, 196 F.3d at 598-99. *Rhoades* recognized a beneficiary's right to waive pension benefits:

> This court in *Stobnicki v. Textron*, 868 F.2d 1460, 1465 (5th Cir. 1989) held that "a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an assignment made pursuant to a bona-fide settlement of such a controversy is not invalidated

> by the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1)."
>
> * * *
>
> In *Stobnicki,* this court thoroughly examined the legislative history of ERISA and the effect that the legislative history has on the scope of the anti-alienation provision. We held that courts "will not ascribe to Congress the intent of making unreasonable law – one requiring terminal litigation rather than settlements as does the general law," and therefore the apparent statutory bar against alienation of pension benefits should yield to reason and allow benefits to be voluntarily waived for settlement purposes.

Rhoades, 196 F.3d at 599, citing *Stobnicki,* 868 F.2d at 1463-1464.

In *Guardian Life Insurance Company of America v. Finch,* 395 F.3d 238 (5th Cir. 2004), *cert. denied sub nom. Finch v. Galaway*, 544 U.S. 1056 (2005), another Fifth Circuit panel concluded that federal common law governs the determination of whether a beneficiary has waived beneficiary rights under ERISA. *Id.* at 241. Now that ruling, too, is in doubt. In rendering its opinion here, the Fifth Circuit abandoned its traditional waiver analysis. The Fifth Circuit no longer holds, as it did in *Rhodes* and *Stobnicki,* that the apparent statutory bar against alienation of pension benefits must yield to reason.

DuPont chastises Kennedy for citing "two outdated decisions by the Seventh and Fourth Circuits

which took the position that the ERISA anti-alienation provision did not apply to beneficiaries of a pension plan in connection with the dissolution of a marriage." DuPont insists that the Fifth Circuit's decision does not conflict with *Fox Valley* and *Altobelli* on the grounds that they "do not reflect current law."[1]

DuPont fails to mention *Melton v. Melton,* 324 F.3d 941 (7th Cir. 2003), a case the Seventh Circuit decided six years after *Boggs*. In *Melton,* the Seventh Circuit reaffirmed *Fox Valley's* continuing validity as precedent:

> Even where ERISA preempts state law with respect to determining beneficiary status under an ERISA-regulated benefits plan, ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary of such a plan. *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown,* 897 F.2d 275, 282 (7th Cir. 1990) (*en banc*) . . . The rule that emerged required proof of a specific termination of the rights in question in order to effectively waive a beneficiary's interest under an ERISA-regulated plan. *Id.* Another formulation of this principal mandates that an attempted waiver by a designated beneficiary of an ERISA-regulated benefits plan be "explicit, voluntary, and made in good faith" to be considered valid. *Manning v. Hayes,* 212 F.3d 866, 874 (5th Cir. 2000). Essentially,

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[1] *See* DuPont's Response, at 7-8. DuPont also omits this Court's denial of *certiorari* in its citations to *Fox Valley*.

> when we are evaluating whether the wa[iv]er is effective in a given case, we are more concerned with whether a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question than with any magic language contained in the waiver itself. *See, e.g., Clift v. Clift,* 210 F.3d 268, 271 (5th Cir. 2000).

Melton, 324 F.3d at 945-46.

Although DuPont insists that *Fox Valley* is a spent shell, courts view it as live ammunition. If the Seventh Circuit's judges thought that *Boggs* invalidated *Fox Valley, Melton* provided an opportunity to overrule it. They did not do so. They did not even hint that *Fox Valley* might be "outdated." No Seventh Circuit panel has repudiated or limited *Fox Valley*.

New York's highest court cited *Fox Valley* as authority for federal common law waiver four years ago, when it decided *Silber v. Silber,* 99 N.Y.2d 395, 786 N.E.2d 1263, 1268 (2003), *cert. denied,* 2003 U.S. LEXIS 5579 (2003). The Texas Supreme Court relied on *Fox Valley* and *Altobelli* in a pension benefits case involving a divorce-decree waiver similar to the one here: *Keen v. Weaver,* 121 S.W.3d 721, 725 (Tex. 2003), *cert. denied,* 540 U.S. 1047 (2003). Two years later, the Nebraska Supreme Court cited both cases in *Strong v. Omaha Construction Industry Pension Plan,* 270 Neb. 1, 701 N.W.2d 320, 327 (2005), another pension case.

On page 8 of its response, DuPont tries to slap a similar "outdated" label on *Altobelli*. But Fourth Circuit courts have neither repudiated nor limited *Altobelli*. *See Graef v. Retirement Income Plan for Emples. of Albemarle Corp.*, No. 98-1188, 1998 U.S. App. LEXIS 31582, 22 Employee Benefits Cas. (BNA) 2280 at *11-16 (4th Cir. Dec. 17, 1998); *Neal v. GMC*, 266 F.Supp.2d 449, 454 (W.D.N.C. 2003). Other courts cite *Altobelli*, too. *See, e.g., Smith v. Smith*, 919 So.2d 525, 529 (Fla. Ct. App. [5th Dist.] 2005); *Young v. Anne Arundel County*, 146 Md. App. 526, 807 A.2d 651, 684 (2002); *Sweebe v. Sweebe*, 474 Mich. 151, 712 N.W.2d 708, 712 (2006).

DuPont can call *Fox Valley* and *Altobelli* "outdated," but America's judges do not – they cite them as authority. There *is* a circuit split, whether DuPont admits it or not.

On page 9 of its Response, DuPont proudly proclaims that "[t]here is no conflict between" the Fifth Circuit's August 15, 2007 opinion and the Texas Supreme Court's contrary opinion in *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003).[2] Although DuPont suggests that the Texas Supreme Court will follow the Fifth Circuit's lead, it ignores the state court's concerns about the danger of rewarding "slayers." *Keen*, 121 S.W.3d at

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[2] DuPont omits the denial of Patsy Keen's *certiorari* petition in its citations on pages 9-10 of its Response and in its Index to Authorities at iv.

726 n.4, citing *Admin. Comm. for the H.E.B. Inv. and Ret. Plan v. Harris,* 217 F.Supp.2d 759, 761-62 (E.D. Tex. 2002). Under the Fifth Circuit's opinion, plan administrators must pay those who slay – even those who slay their spouses – lest they run afoul of the Fifth Circuit's inflexible interpretation of ERISA's anti-alienation rule.

On page 10 of its Response, DuPont speculates that, "[i]f the Texas courts are faced in the future with a case like this one, it is likely that Texas courts will follow the Fifth Circuit's decision in this case." Four and one half years have lapsed since the *Keen* decision of June 19, 2003 – along with 84,316 Texas divorces in 2003 and 81,324 in 2004[3] – but DuPont cannot cite a Texas case that questions *Keen*. The Fifth Circuit's rigid reading of ERISA now pits state court judges against their federal counterparts serving in the U.S. District Courts for the Southern, Northern, Eastern, and Western Districts of Texas. The potential for forum-shopping, malpractice, and conflicts between the state and federal judiciaries make this case significant to Texas' 23,507,783 people, its lawyers, and its courts.[4]

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[3] *See, e.g.,* Center for Disease Control, NATIONAL VITAL STATISTICS REPORTS, vol. 54, no. 20 (July 21, 2006), Table 3, at http://0-www.cdc.gov.pugwash.lib.warwick.ac.uk/NCHS/data/nvsr/nvsr54/nvsr54_20.pdf. Petitioner requests this Court to take judicial notice of those statistics under Federal Rule of Evidence 201.

[4] *See* the Texas population statistics, U.S. Census Bureau, available at quickfacts.census.gov/qfd/states/48000.html (Jan. 18,

(Continued on following page)

DuPont minimizes the Nebraska Supreme Court's holding in *Strong v. Omaha Construction Industry Pension Plan,* 270 Neb. 1, 701 N.W.2d 320 (2005) (*per curiam*) by calling it "inapplicable" and chiding that court for "largely ignoring the [ERISA] anti-alienation provision." *Id.* at 11 fn.7. *Strong,* a pension case that cited *Fox Valley* and *Altobelli,* is important not only to Nebraska's 1,768,331 residents, but also to its courts. The Justices of the Nebraska Supreme Court did not "ignore" ERISA's anti-alienation provision, as DuPont suggests, but, instead, discussed the anti-alienation clause at the beginning of their opinion:

> We note that ERISA contains anti-alienation provisions that prevent plan participants from unwisely alienating their interests in ERISA-regulated pension plans. 29 U.S.C. § 1056(d). A qualified domestic relations order (QDRO) is an exception to the anti-alienation rule. . . . It is undisputed that the divorce decree failed to comply with these requirements and therefore was not a QDRO.

Strong, 701 N.W.2d at 325.

The federal common law versus plan-documents divide, as well as recent schisms involving ERISA's QDRO and anti-alienation provisions, pose real

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2008). Petitioner respectfully requests this Court to take judicial notice of Texas' population under Federal Rule of Evidence 201.

challenges to pension-plan participants, beneficiaries, plan administrators, and courts. *See, e.g., McGowan v. NJR Service Corp.*, 423 F.3d 241, 244-45 (3rd Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1118, 166 L. Ed. 2d 906 (2007); *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990); and the other cases listed on pages 9-12 of the Estate's Petition for *Certiorari*. As discussed in the Petition, fifty-four percent (54%) of American workers have access to retirement plans, while fifty-one percent (51%) participate in a retirement plan of at least one type, while a little more than a million marriages now end in divorce every year. This is a *cert.*-worthy case.

On page 12 of its Response, DuPont criticizes the late William Patrick Kennedy for not doing one of three different things to ensure that his SIP benefit went to someone other than Liv Kennedy. But the attorneys who drafted William and Liv Kennedy's 1994 divorce decree agreed that Liv Kennedy would knowingly, intelligently, and expressly waive her rights to the DuPont SIP benefits. The Fifth Circuit's *Stobnicki* decision of 1989 and the Seventh Circuit's *en banc, certiorari* denied *Fox Valley* decision of 1990 would have assured those attorneys that their divorce decree would be respected rather than rejected. This Court should grant *certiorari* to bring order out of chaos, prevent courts from thwarting the reasonable expectations of divorcing parties and their heirs, and rule that knowing, intelligent and express waivers of ERISA rights are enforceable under federal common law.

The widening division over ERISA QDROs is important to more than one hundred million Americans who live in the states subject to that divide. According to U.S. Census Bureau statistics from 2006, the Seventh Circuit had a total population of at least 24,701,996 in 2006 (Illinois, 12,831,970; Indiana, 6,313,520; Wisconsin, 5,556,506).[5] The states of the Fourth Circuit – Maryland (5,615,727), Virginia (7,642,884), West Virginia (1,818,470), North Carolina (8,856,505) and South Carolina (4,321,249) – had 28,254,835 people.[6] The Fifth Circuit had 30,706,091 people (Texas, 23,507,783; Louisiana, 4,287,768; Mississippi, 2,910,540).[7] Since the New York Court of Appeals followed the Seventh and Fourth Circuits in *Silber,* and since the Nebraska Supreme Court did the same in *Strong,* this Court should also recognize that New York's 19,306,183 people and Nebraska's 1,768,331 have a stake in this case.[8] And that is just the most narrowly-defined anti-alienation/QDRO issue. The larger controversy concerning ERISA waivers under the federal common law divides courts across the country, and involves almost everyone. The pervasive, persistent division of ERISA authorities in this case cries out for *certiorari.*

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[5] U.S. Census Bureau, quickfacts.census.gov/qfd/states/48000.html (Jan. 18, 2008).

[6] *Id.*

[7] *Id.*

[8] *Id.*

II. The Fifth Circuit erred in applying a plan-deferential five-factor abuse of discretion test for awarding attorney's fees that penalizes prevailing parties in ERISA cases.

This Court should clarify the standard governing ERISA attorney's fees under 29 U.S.C. § 1132(g)(1) by adopting the Civil Rights Act overlay in *Smith v. CMTA-IAM Pension Trust,* 746 F.2d 587, 590 (9th Cir. 1984). There, the Ninth Circuit considered case law under 28 U.S.C. § 1988 and ruled that prevailing plaintiffs should ordinarily recover attorney's fees, citing *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983).

The Estate cited this Court's attorney's fee decision in *Hensley* when it sought its fees. R., Doc. 77 at 12 n.5 and Doc. 72-4 at 8 of 31, ¶ 15. The Estate analyzed each factor in the five-factor test, then asked the district court to "resolve any uncertainties about fees by awarding them to Plaintiff Kennedy, the prevailing party in this case." *Id.,* Doc. 72-1 at 6-20; Doc. 77 at 5-7 and 23 ¶ 7, citing *Chambless v. Masters, Mates & Pilots Pension Plan,* 815 F.2d 869, 871 (2d Cir. 1987). R., Doc. 72-1 at 7, ¶ 17.

The Estate devoted pages 32-52 of its May 31, 2006 Appellee's and Cross-Appellant's Brief to its claim for attorney's fees. On pages 49-52, it argued for liberalization of fee standards in ERISA cases, explained the deficiencies of the five-factor test, and referenced *Martin v. Franklin Capitol Corporation,* 546 U.S. 132, 137 (2005). On pages 50-51, the Estate

analyzed ERISA's legislative history and cited Jessica Michelle Westbrook, *Resolving the Dispute over When Attorney's Fees Should Be Awarded under ERISA in Two Words: Plaintiff Prevails,* 53 ALA. L. REV. 1311, 1323 (Summer 2002).

When DuPont writes that there is no division of authorities about fee awards, DuPont errs. In *Bittner v. Sadoff & Rudoy Industries, Inc.,* 728 F.2d 820 (7th Cir. 1984), Judge Posner did not apply the five-factor test, but instead looked to the Equal Access to Justice Act for guidance in a manner that weighed review of discretion in favor of a prevailing party. *Id.* at 826-830. The *Bittner* approach remains a alternative to the various versions of the "five-factor test" to this day. *See, e.g., Sullivan v. William A. Randolph, Inc.,* 504 F.3d 665, 670-71 (7th Cir. 2007).

In *Martin v. Arkansas Blue Cross & Blue Shield,* 299 F.3d 966, 972 (8th Cir. 2002) (*en banc*), the Eighth Circuit overruled *Landro v. Glendinning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980) and elected to use the five-factor test, but not without controversy. In dissent, Circuit Judges Bye and McMillian urged the adoption of a better standard:

> Criticisms of the five-factor test include (a) the superfluous nature of the first factor, since courts already have the inherent ability to shift fees because of bad faith, (b) the fact that the second factor does not apply to most ERISA situations because an ERISA plan typically pays the fees of a prevailing

> party rather than the plan administrators *personally*, and (c) ERISA already provides strict fiduciary standards that accomplish the goals of the third factor, deterrence. . . . I believe we should develop a better test.
>
> I would abandon the first three factors and replace them with one – "whether a reasonable plaintiff would have brought suit if no award of attorney's fees was possible." 71 CORNELL L. REV. at 1062. . . .

Martin, 299 F.3d at 973-74, citing Mark Berlind, *Attorney's Fees under ERISA: When is an Award Appropriate?,* 71 CORNELL L. REV. 1037, 1058 (1986). ERISA should be liberally construed to further the statute's remedial purpose, as in *Chambless v. Masters, Mates, & Pilots Pension Plan*, 815 F.2d 869, 872 (2nd Cir. 1987) and *McElwaine v. U.S. West, Inc.,* 176 F.3d 1167, 1172 (9th Cir. 1999), rather than in a fashion that punishes prevailing heirs of participants.

This Court should grant a writ of *certiorari* to correct the error below, resolve the conflict among the circuits and state supreme courts, and establish a just, uniform, federal common law rule of waiver for these recurring and important ERISA divorce-decree issues.

CONCLUSION

Petitioner Kari Ellen Kennedy, Independent Executrix of the Estate of William Patrick Kennedy, requests this Court to GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and order briefing on the merits.

Respectfully submitted,

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JOINT APPENDIX

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(5)

No. 07-636

Supreme Court, U.S.
FILED
MAY 5 - 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

KARI ELLEN KENNEDY, Independent Executrix of the Estate of William Patrick Kennedy, Deceased,

Petitioner,

versus

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS AND COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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06-3788 109P

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The Divorce Decree between William P. Kennedy and Liv Kennedy, dated June 2, 1994 ..... App. 60

The Second, Amended Qualified Domestic Relations Order, filed December 3, 1997 ..... App. 53

The United States District Court for the Eastern District of Texas, Beaumont Division's Order deciding the parties' cross-motions for summary judgment dated March 3, 2005 ..... App. 19

The District Court's final Judgment, October 5, 2005 ..... App. 15

The Fifth Circuit Court's Opinion in this case, August 15, 2007 ..... App. 1

RELEVANT DOCKET ENTRIES

U.S. District Court [LIVE]
Eastern District of TEXAS LIVE (Beaumont)
CIVIL DOCKET FOR CASE #: 1:01-cv-00904-KFG

Date Filed	#	Docket Text
12/14/2001	1	Original Complaint filed. Cause: 29:1132 E.R.I.S.A. – Employee Benefits (bst) (Entered: 12/17/2001)
		* * *
02/19/2002	2	Answer to complaint by Plan for DuPont, E I DuPont (mrp) (Entered: 02/21/2002)
02/19/2002	2	Counterclaim by Plan for DuPont, E I DuPont against Kari Ellen Kennedy (mrp) (Entered: 02/22/2002)
		* * *
02/28/2002	3	Corporate Disclosure Statement filed by E I DuPont (mrp) Additional attachment(s) added on 2/1/2006 (pkb,). (Entered: 03/01/2002)
04/09/2002	4	Consent by plaintiff Kari Ellen Kennedy for disposition of case by U.S. Magistrate Judge. (mrp) Modified on 04/12/2002 Additional attachment(s) added on 2/1/2006 (pkb,). (Entered: 04/10/2002)
04/09/2002	5	Consent by defendant Plan for DuPont, defendant E I DuPont for disposition of case by U.S. Magistrate Judge. (mrp) Additional attachment(s)

added on 2/1/2006 (pkb,). (Entered: 04/12/2002)

04/10/2002 6 MOTION by Kari Ellen Kennedy for leave to file reply to counterclaim (mrp) Modified on 04/12/2002 Additional attachment(s) added on 2/1/2006 (pkb,). (Entered: 04/11/2002)

04/11/2002 7 Order referring case to Magistrate Judge Wendell C. Radford pursuant to 28 USC 636(c) by consent (signed by Judge Howell Cobb) Date Signed: 4/10/02 (copy file forwarded to WCR) cc: WCR, AB, PB, attys 4/12/02 bse) (Entered: 04/12/2002)

* * *

04/15/2002 9 ORDER granting [6-1] motion for leave to file reply to counterclaim. Ordered that pltf shall reply by 4/30/02 (signed by Magistrate Judge Wendell C. Radford) cc: WCR, attys 4/17/02 bse) (Entered: 04/17/2002)

05/01/2002 10 Reply by Kari Ellen Kennedy to defts' [2-1] counter claim bse) Additional attachment(s) added on 2/1/2006 (pkb,). (Entered: 05/01/2002)

* * *

06/14/202 15 MOTION by E I DuPont, Plan for DuPont for leave to file 3rd pty complaint (mrp) Additional attachment(s) added on 2/1/2006 (pkb,). (Entered: 06/17/2002)

07/01/2002	16	ORDER granting [15-1] motion for leave to file 3rd pty complaint against Liv Kennedy, joining her as a party to this litigation. (signed by Magistrate Judge Wendell C. Radford) cc: attys 7/2/02 (mrp) (Entered: 07/02/2002)
07/31/2002	17	Third-party by Plan for DuPont, E I DuPont against Liv Kennedy bse) (Entered: 08/01/2002)
01/07/2003	18	Answer to 3rd Party complaint by Liv Kennedy (bjc) (Entered: 01/07/2003)

* * *

02/24/2003	21	MOTION by Kari Ellen Kennedy for leave to file amended complaint bse) Additional attachment(s) added on 2/1/2006 (pkb,). (Entered: 02/25/2003)

* * *

05/08/2003	23	ORDER granting [21-1] motion for leave to file amended complaint (signed by Magistrate Judge Wendell C. Radford) cc: WCR, attys 5/8/03 bse) (Entered: 05/08/2003)
06/20/2003	24	Amended complaint by Kari Ellen Kennedy , (Answer due 6/30/03 for E I DuPont and for Plan for DuPont) amending [1-1] complaint bse) (Entered: 06/23/2003)

07/07/2003	25	Original Answer to pltf's amended cmplt by Plan for DuPont, and E I DuPont bse) Additional attachment(s) added on 2/1/2006 (pkb,). (Entered: 07/08/2003)
07/07/2003	25	Counterclaim for declaratory judgment by Plan for DuPont and E I DuPont and plan administrator for DuPont savings and investment plan against pltfs bse) (Entered: 07/08/2003)
08/07/2003	26	Answer to pltf's amended cmplt by Liv Kennedy bse) (Entered: 08/07/2003)

* * *

03/05/2004	33	STIPULATION OF FACTS (unscanned exhibit located in Clerk's Office file) (mrp,) (Entered: 03/08/2004)
03/15/2004	34	Defendants' Unopposed MOTION for Leave to File First Amended Answer and Counterclaim for Declaratory Judgment of defendants E I Dupont De Nemours and Company and Plan Administrator for Dupont Savingsand [sic] Investment Plan (Attachments: #1 proposed order)(mrp,) (Entered: 03/17/2004)
03/15/2004	35	Defendant's MOTION for Leave to File Amended Third Party Complaint of E I Dupont De Nemours and Company and Plan Administrator for Dupont Savings and Investment Plan (Attachments: # 1 proposed order)(mrp,) (Entered: 03/17/2004)

03/22/2004	36	ORDER granting 34 Motion for Leave to File First Amended Answer and Counterclaim for Declaratory Judgment of Defendants E I DuPont and Plan Administrator, granting 35 Motion for Leave to File Amended Third Party Complaint of E I DuPont and Plan Administrator. Signed by Judge Wendell C. Radford on 3/22/04. (mrp,) (Entered: 03/22/2004)
03/22/2004	37	Amended Third Party Complaint of E I DuPont De Nemours and Company and Plan Administrator for DuPont Savings and Investment Plan(mrp,) (Entered: 03/22/2004)
03/22/2004	38	FIRST AMENDED ANSWER and Counterclaim for Declaratory Judgment of defendants E I DuPont De Nemours and Company and Plan Administrator for DuPont Savings and Investment Plan(mrp,) (Entered: 03/22/2004)
04/02/2004	39	Alternative Motion for Summary Judgment against third party defendant by E I DuPont de Nemours & Company. (Attachments: # 1 proposed order)(mrp,) (Entered: 04/05/2004)

04/02/2004 40 MOTION for Summary Judgment and supporting brief by E I DuPont de Nemours & Company. (Attachments: # 1 proposed order)(mrp,) (Entered: 04/05/2004)

04/02/2004 41 MOTION for Summary Judgment (Unscanned attachments and exhibits located in Clerk's Office file) by Kari Ellen Independent Executrix of The Estate of William Patrick Kennedy, Deceased, (Attachments: # 1 proposed order)(mrp,) (Entered 04/05/2004)

* * *

05/21/2004 45 RESPONSE to defendants' 40 MOTION for Summary Judgment filed by plaintiff Kari Ellen Kennedy (the Executrix). (mrp,) (Entered: 05/21/2004)

05/21/2004 46 RESPONSE to pla's 41] MOTION for Summary Judgment filed by E I DuPont de Nemours & Company, Plan Administrator for DuPont Savings & Investment Plan. (bjc,) (Entered: 05/24/2004)

05/21/2004 47 RESPONSE pla's 41 MOTION for Summary Judgment and third party pla's alternative 39 motion for summary judgment filed by Liv Kennedy. "unscanned exhibits A-E located in clerk's office" (bjc,) Modified on 5/24/2004 (bjc,). Modified on 10/8/2004 (bjc,). (Entered: 05/24/2004)

* * *

06/04/2004	49	AGREED MOTION for abatement of pretrial scheduling deadlines by E I DuPont de Nemours & Company, Kari Ellen Independent Executrix of The Estate of William Patrick Kennedy, Deceased. (Attachments: # 1 proposed order) (mrp,) (Entered: 06/08/2004)
06/04/2004	50	AGREED MOTION to Continue Trial Setting by E I DuPont de Nemours & Company, Kari Ellen Independent Executrix of The Estate of William Patrick Kennedy, Deceased. "Two pleading document, see Motion for Abatement #49" (mrp,) (Entered: 06/08/2004)
06/10/2004	51	ORDER granting 49 Motion Abatement of the Court's Pretrial Scheduling Deadlines. Signed by Judge Wendell C. Radford on 6/8/04. (mrp,) (Entered: 06/14/2004)
06/14/2004	52	Defendants' Unopposed Motion for Leave to Supplement Defendants' Response to Plaintiff's Motion for summary Judgment (Attachments: # 1 proposed order) (mrp,) (Entered: 06/15/2004
06/14/2004	53	RESPONSE to 44 Plaintiff Executrix's Objections to the Affidavit of Defendants' Witness Mary D Dineen by E I DuPont de Nemours & Company. (Attachments: # 1 proposed order) (mrp,) (Entered: 06/15/2004)

06/14/2004 54 REPLY to Plaintiff's Response to 40 Defendant's MOTION for Summary Judgment filed by E I DuPont de Nemours & Company. (Attachments: # 1 proposed order)(mrp,) (Entered: 06/15/2004)

06/14/2004 55 Reply of defendants to Third-Party plaintiff Liv Kennedy's Response to Plaintiff's Motion for Summary Judgment39 and Third-Party plaintiff's Alternative Motion [48] for Summary Judgment (Attachments: # 1 proposed order)(mrp,) (Entered: 06/15/2004)

06/14/2004 56 Plaintiff's REPLY to Defendant's Response to Plaintiff's 41 MOTION for Summary Judgment filed by Kari Ellen Independent Executrix of The Estate of William Patrick Kennedy, Deceased, (mrp,) (Entered: 06/15/2004)

06/14/2004 57 Plaintiff's REPLY to Liv Kennedy's Response to Plaintiff's 41 MOTION for Summary Judgment filed by Kari Ellen Independent Executrix of The Estate of William Patrick Kennedy, Deceased. (mrp,) (Entered: 06/15/2004)

06/18/2004 58 ORDER granting 52 Motion for Leave to supplement dfts' response to plas' motion for sum jgm. Signed by Judge Wendell C. Radford on 6/16/04. (fbc,) (Entered: 06/18/2004)

07/21/2004	59	Defendants' Unopposed MOTION for leave to substitute affidavit submitted in support of defendants' response to plaintiff executrix's objections to the affidavit of defendant's witness Mary D Dineen (Attachments: # 1 proposed order) (mrp,) (Entered: 07/22/2004)
07/23/2004	60	ORDER granting 59 Motion for Leave to substitute Affidavit submitted in support of defendants' response to plaintiff Executrix's Objections to the affidavit of defendant's witness Mary D Dineen . Signed by Judge Wendell C. Radford on 7/23/04. (mrp,) (Entered: 07/26/2004)
10/08/2004		Judge Keith F. Giblin added. Judge Wendell C. Radford no longer assigned to case pursuant to Gen Ord # 04-22. (bjc,) (Entered: 10/18/2004)
03/03/2005	61	ORDER of the Court. Fully incorporating the findings and legal conclusions set forth herein, the Court Orders as follows: Plaintiff's Motion for Summary Judgment doc #41 is granted, and Plaintiff is accordingly entitled to the value of decedent's benefits at the time of his death, $402,152.56; Defendant's Motion for Summary Judgment doc #40 is denied in part and granted in part, being granted with respect to Plaintiff's state law contractual claims;

and the Third Party Plaintiff's Alternative Motion for Summary Judgment against Third Party Defendant doc #39 is denied. Signed by Judge Keith F. Giblin on 3/3/05. (mrp,) (Entered: 03/04/2005)

* * *

03/29/2005 63 Minute Entry for proceedings held before Judge Keith F. Giblin: Status Conference held on 3/29/2005. (Court Reporter Kyla Dean) (ksd) (Entered: 03/30/2005)

* * *

06/02/2005 66 MOTION for Leave to File *Second Amended Third Party Complaint* by E I DuPont de Nemours & Company. (Attachments: #1 #2)(Pratt, Elizabeth) (Entered: 06/02/2005)

06/03/205 67 ORDER granting 66 Motion for Leave to File second amended third party complaint. Cnsl is ordered to e-file second and third party cmplt. Signed by Judge Keith F. Giblin on 6/2/05. (fbc,) (Entered: 06/03/2005)

06/06/2005 68 AMENDED COMPLAINT against Liv Kennedy, filed by E I DuPont de Nemours & Company.(Pratt, Elizabeth) (Entered: 06/06/2005)

06/14/2005 69 ANSWER to Amended Complaint by Liv Kennedy.(Brinkley, Patrick) (Entered: 06/14/2005)

06/28/2005 70 STIPULATION *OF FACT* by E I DuPont de Nemours & Company. (Attachments: #1 Exhibit Exhibit A – Part 1# 2 Exhibit Exhibit A –Part 2# 3 Exhibit Exhibit A – Part3# 4 Exhibit Exhibit A – Part4# 5 Exhibit Exhibits B, C, & D)(Pratt, Elizabeth) (Entered: 06/28/2005)

06/30/2005 71 MOTION to Dismiss *for Entry of Agreed Judgment As To Third Party Claims Against Liv Kennedy* by E I DuPont de Nemours & Company. (Attachments: # 1)(Pratt, Elizabeth) (Entered: 06/30/2005)

* * *

08/01/2005 73 MOTION for Judgment as a Matter of Law *Motion for Entry of Judgment*_by Kari Ellen Independent Executrix of The Estate of William Patrick Kennedy, Deceased. (Attachments: # 1 Judgment)(Kelly, Stacy) (Entered: 08/01/2005)

* * *

08/19/2005 76 RESPONSE to Motion re 73 MOTION for Judgment as a Matter of Law *Motion for Entry of Judgment* filed by E I DuPont de Nemours & Company. (Attachments: # 1 Text of Proposed Order Order Denying Plaintiff's Motion for Entry of Judgment)(Pratt, Elizabeth) (Entered: 08/19/2005)

* * *

08/31/2005 78 REPLY to Response to Motion re 73 MOTION for Judgment as a Matter of Law *Motion for Entry of Judgment* filed by Kari Ellen Independent Executrix of The Estate of William Patrick Kennedy, Deceased. (Kelly, Stacy) (Entered: 08/31/2005)

09/12/2005 79 RESPONSE to Motion re 73 MOTION for Judgment as a Matter of Law *Motion for Entry of Judgment Sur-Reply to Plaintiff's Reply to Defendants' Response* filed by E I DuPont de Nemours & Company. (Attachments: # 1 Text of Proposed Order)(Pratt, Elizabeth) (Entered: 09/12/2005)

* * *

10/05/2005 81 ORDER denying 72 Motion for Attorney Fees . Signed by Judge Keith F. Giblin on 10/5/05. (bjc,) (Entered: 10/06/2005)

10/05/2005 82 FINAL JUDGMENT. Ordered that pla have and recover from dft EI Dupont de Nemours and Co and Plan Administrator for DuPont Savings and Investment Plan, jointly and severally, the amt of $402,152.56 (amt 1), plus pre-judgment interest at the rate of 6/25% simple interest on such amt from 10/24/01, through the day before entry of this final judgment

(amt 2), w/post-judgment interest on amts 1 and 2 thereon, from the date of judgment until pd at the federal judgment rate. Ordered that dft EI DuPont de Nemours and Co and Plan Administrator for DuPont Savings and Investment Plan take nothing on their claims against pla Kari Ellen Kennedy. Ordered that the motion for entry of agree judgment as to 3rd claims against Liv Kennedy is granted. Ordered that all parties shall bear their own atty fees, w/ dft EI DuPont de Nemours to bear the taxable ct costs expended by pla Kari Ellen Kennedy; and dft EI DuPont de Nemours and Liv Kennedy to bear their own taxable ct costs, respectfully. all pending motions not previously ruled upon are denied as moot and any relief not specifically granted herein is denied. . Signed by Judge Keith F. Giblin on 10/5/05. (bjc,) (Entered: 10/06/2005)

10/20/2005 83 ***TWO PART DOC. SEE ALSO DOC# 84.***

MOTION for Judgment as a Matter of Law *and Alternative Motion for new Trial* by E I DuPont de Nemours & Company. (Attachments: # 1 Exhibit # 2 Text of Proposed Order)(Pratt, Elizabeth) Modified on 10/21/2005 (bjc,). (Entered: 10/20/2005)

10/21/2005 84 ***TWO PART DOC. SEE ALSO DOC# 83.***

MOTION for New Trial by E I DuPont de Nemours & Company. (Pratt, Elizabeth) Modified on 10/21/2005 (bjc,). (Entered: 10/21/2005)

11/03/2005 85 RESPONSE to Motion re 83 motion for judgment as a matter of law and 84 MOTION for New Trial filed by Kari Ellen Independent Executrix of The Estate of William Patrick Kennedy, Deceased. (Kelly, Stacy) Additional attachment(s) added on 11/3/2005 (bjc,). (Entered: 11/03/2005)

11/15/2005 86 ORDER denying 83 Motion for Judgment as a Matter of Law, and 84 Motion for New Trial. Signed by Judge Keith F. Giblin on 11/15/05. (bjc,) (Entered: 11/16/2005)

* * *

12/15/2005 88 NOTICE OF APPEAL as to 82 Judgment, 86 Order on Motion for Judgment as a Matter of Law, Order on Motion for New Trial by Plan Administrator for DuPont Savings & Investment Plan, E I DuPont de Nemours & Company. Filing fee $ 255, paid, Receipt number 1-1-1389. (Attachments: # 1)(pkb,) (Entered: 12/15/2005)

* * *

12/13/2006	94	ORDER granting in part and denying 87 Motion to Stay . The Motion is denied as to the waiver of the supercedeas bond and granted as to the stay of the execution of judgment pending the posting of the bond under FRAP 62(d). The court further directs DuPont to post a supersedeas bond in the amount of $532,926.16 pending the appeal of the final judgment in this case. Signed by Judge Keith F. Giblin on 2/13/06. (pkb,) (Entered: 02/13/2006)

* * *

03/03/2006	96	Appeal BOND in the amount of $532,926.16 posted by E I DuPont de Nemours & Company (pkb,) (Entered: 03/03/2006)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,	§	**ANSWER TO AMENDED COMPLAINT**
VS.	§	**CIVIL ACTION NO. 1:01 CV-904**
E.I. DUPONT DE NEMOURS AND COMPANY AND PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN	§	(Filed Aug. 7, 2003)

TO THE HONORABLE MAGISTRATE JUDGE:

Third Party Defendant, Liv Kennedy alleges:

1.

Pleading in response to Paragraph 1 of the Plaintiff's Amended Complaint, Third Party Defendant does not contest the assertions made.

2.

Pleading in response to Paragraph 2 of the Plaintiff's Amended Complaint, Third Party Defendant does not dispute that Plaintiff is attempting to assert a claim against Third Party Defendant for determination of her obligation regarding estate taxes paid. Third Party Defendant denies that Plaintiff has

standing to recover from Liv Kennedy any of the estate taxes paid by on behalf of the Estate. Third Party Defendant contends that Plaintiff's recourse is through the government entity that collected the taxes if indeed any taxes were owed on the benefits paid to Liv Kennedy.

3.

Pleading in response to Paragraph 3 of Plaintiff's Amended Complaint, Third Party Defendant does not contest venue or the jurisdiction of this Court.

4.

Pleading in response to Paragraph 4 of Plaintiff's Amended Complaint, Third Party Defendant does not contest Plaintiff's standing to pursue its claims against DuPont though Third Party Defendant asserts that the claims are without merit. Third Party Defendant denies that the beneficiary designation relied upon by Third Party Defendant was invalid.

5.

Pleading in response to Paragraph 5 of Plaintiff's Amended Complaint, Third Party Defendant contests Plaintiff's standing as Independent Executrix of the Estate of William Patrick Kennedy to recover from Liv Kennedy, estate taxes paid by the Estate.

6.

Pleading in response to Paragraph 6 of Plaintiff's Amended Complaint, Third Party Defendant does not dispute that the Estate of William Patrick Kennedy

was a potential beneficiary of the proceeds of some of the employee benefit plans in which William Patrick Kennedy participated. In so pleading, however, Third Party Defendant does not agree that the Estate of William Patrick Kennedy is a proper potential beneficiary of proceeds of all such employee benefit plans, including the Savings and Investment Plan ("SIP"). Third Party Defendant also denies that the benefits from any plans were improperly paid.

7.

Pleading in response to Paragraph 7 of Plaintiff's Amended Complaint, Third Party Defendant agrees with the contention that the DuPont SIP is an employee pension benefit plan as defined by 29 U.S.C. § 1002(2).

8.

No response from Third Party Defendant is required for Paragraph 8 of Plaintiff's Amended Complaint as these allegations relate only to DuPont.

9.

Pleading in response to Paragraph 9 of Plaintiff's Amended Complaint, Third Party Defendant agrees with the allegation that Liv Kennedy is the former spouse who received retirement benefits from DuPont and has already made an appearance before this court.

10.

Pleading in response to Paragraph 10 of Plaintiff's Amended Complaint, Third Party Defendant agrees that Decedent was employed by DuPont.

11.

Pleading in response to Paragraph 11 of Plaintiff's Amended Complaint, Third Party Defendant agrees that Decedent designated Liv Kennedy as the beneficiary of his employee pension benefit plan.

12.

Pleading in response to Paragraph 12 of Plaintiff's Amended Complaint, Third Party Defendant agrees that Decedent and Liv Kennedy were divorced on June 2, 1994.

13.

Pleading in response to Paragraph 13 of Plaintiff's Amended Complaint, Third Party Defendant denies that Liv Kennedy "explicitly, voluntarily and in good faith, waived her rights to proceeds that are a result of Decedent's employment." To the contrary, Liv Kennedy has made claim and has collected proceeds from the SIP. Any language relating to the disposition of SIP funds in the decree of divorce is not relevant.

14.

Pleading in response to Paragraph 14 of Plaintiff's Amended Complaint, Third Party Defendant agrees that Plaintiff requested that DuPont pay the

proceeds of the plan to the Estate of William Patrick Kennedy.

15.

Pleading in response to Paragraph 15 of Plaintiff's Amended Complaint, Third Party Defendant does not contest the assertion that DuPont denied the claim.

16.

Pleading in response to Paragraph 16 of Plaintiff's Amended Complaint, Third Party Defendant agrees that Liv Kennedy has received benefits from the SIP.

17.

Pleading in response to Paragraph 17 of Plaintiff's Amended Complaint, Third Party Defendant cannot admit or deny the allegation due to lack of information.

18.

Pleading in response to Paragraph 18 of Plaintiff's Amended Complaint, Third Party Defendant reasserts all responses previously made to Paragraphs 1-17.

19.

Pleading in response to Paragraph 19 of Plaintiff's Amended Complaint, Third Party Defendant denies the assertion that the beneficiary designation in favor of Liv Kennedy is invalid. To the contrary,

Third Party Defendant maintains that the beneficiary designation in favor of Liv Kennedy is valid and was binding upon the SIP.

20.

Pleading in response to Paragraph 20 of Plaintiff's Amended Complaint, Third Party Defendant denies that the Estate of William Patrick Kennedy became the "default beneficiary."

21.

Pleading in response to Paragraph 21 of Plaintiff's Amended Complaint, Third Party Defendant agrees that the Estate of William Patrick Kennedy was not paid benefits from the SIP, but Third Party Defendant further denies that any benefits were owed to the Estate and, consequently, no legal action was warranted.

22.

Pleading in response to Paragraph 22 of Plaintiff's Amended Complaint, Third Party Defendant denies that legal action is warranted and further deny the Plaintiff should be granted recovery of attorney fees or costs.

23.

Pleading in response to Paragraph 23 of Plaintiff's Amended Complaint, Third Party Defendant reasserts all responses previously made to Paragraphs 1-22.

24.

Pleading in response to Paragraph 24 of Plaintiff's Amended Complaint, Third Party Defendant Third Party Defendant [s.c] cannot admit or deny these assertions due to lack of information.

25.

Pleading in response to Paragraph 25 of Plaintiff's Amended Complaint, Third Party Defendant agrees that the plan was responsible for making payments under the employee benefit plan at issue in accordance with William Patrick Kennedy's designated beneficiary documentation. Payment was properly made in accordance with the plan documents and all applicable laws.

26.

Pleading in response to Paragraph 26 of Plaintiff's Amended Complaint, Third Party Defendant cannot admit or deny these assertions due to lack of information.

27.

Pleading in response to Paragraph 27 of Plaintiff's Amended Complaint, Third Party Defendant denies that any breach of any agreement with William Patrick Kennedy occurred. Third Party Defendant properly paid benefits in accordance with the plan documents and the laws of the United States of America.

28.

Pleading in response to Paragraph 28 of Plaintiff's Amended Complaint, Third Party Defendant reasserts its responses to Paragraph [sic] 1-27.

29.

Pleading in response to Paragraph 29 of Plaintiff's Amended Complaint, Third Party Defendant does not contest jurisdiction.

30.

Pleading in response to Paragraph 30 of Plaintiff's Amended Complaint, due to lack of information, Third Party Defendant cannot admit or deny whether estate taxes were owed on the benefits from the SIP paid to Liv Kennedy. Furthermore, Third Party Defendant has no information concerning what estate taxes were paid by the Estate. As such, Third Party Defendant also cannot admit or deny whether Liv Kennedy is responsible for a portion of the total estate taxes assessed against the Estate.

31.

Pleading in response to Paragraph 31 of Plaintiff's Amended Complaint, Third Party Defendant agrees that Liv Kennedy received benefits from the SIP but, due to lack of information, cannot admit or deny the assertion that she is responsible for a portion of the total estate taxes assessed against the Estate.

32.

Pleading in response to Paragraph 32 of Plaintiff's Amended Complaint, due to lack of information, Third Party Defendant cannot admit or deny the assertion that Plaintiff has just cause to institute and prosecute the action against Liv Kennedy.

33.

Pleading in response to the prayer set forth in Plaintiff's Amended Complaint, due to lack of information, Third Party Defendant cannot admit or deny whether Plaintiff is entitled to recover from Liv Kennedy any portion of the estate taxes paid.

WHEREFORE, PREMISES CONSIDERED, the Third Party Defendant prays that she be absolved of all liability, that all claims against her be dismissed, and that she recover her costs of court and attorney fees from Plaintiff. Third Party Defendant also prays for all further relief to which she may be entitled, whether at law or in equity.

Respectfully submitted,

CHAMBERS, TEMPLETON,
CASHIOLA, THOMAS, LLP

By: /s/ P Dean Brinkley
P. Dean Brinkley
State Bar No. 00793388

2090 Broadway
Beaumont, Texas 77701
(409) 835-5800 -phone
(409) 835-5880 -fax
dbrinkley@ctclaw.com

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been forwarded via certified mail, return receipt requested to the following on this the ___ day of August 2003.

Stacy L. Kelly
THOMPSON & KNIGHT, LLP
333 Clay Street, Suite 3300
Houston, Texas 77002

Elizabeth Pratt
MEHAFFY & WEBER
2615 Calder Avenue
Beaumont, Texas 77704

/s/ P Dean Brinkley
P. Dean Brinkley

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,	§	
Plaintiff,	§	CIVIL ACTION NO. 1:01CV-904
vs.	§	
E. I. DUPONT DE NEMOURS AND COMPANY AND PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN,	§	
Defendant.	§	

STIPULATION OF FACTS

(Filed Mar. 5, 2004)

To eliminate unnecessary and/or duplicative discovery processes, and to otherwise expedite proceedings in this matter, the parties hereby stipulate as follows:

I.

William Patrick Kennedy was a DuPont employee.

II.

William Patrick Kennedy retired on June 30, 1998.

III.

William Patrick Kennedy passed away on March 27, 2001.

IV.

While employed for DuPont, William Patrick Kennedy was married to Liv Kennedy on June 30, 1971.

V.

A decree of divorce was signed in the divorce proceedings between Liv Kennedy and William Patrick Kennedy on June 2, 1994. The parties agree that a true and correct copy of this decree is attached as Exhibit 1 to these stipulations.

VI.

A Second Amended Qualified Domestic Relations Order: DuPont Pension And Retirement Plan was approved by the State District Court on December 3,1997. The parties agree that a true and correct copy of this Order is attached as Exhibit 2 to these stipulations.

VII.

On December 6, 1974, Williams [sic] Patrick Kennedy signed a written designation form identifying Liv Kennedy as his sole beneficiary for DuPont's

Savings And Investment Plan ("SIP"), then called the Thrift Plan. The parties agree that a true and correct copy of this designation is attached as Exhibit 3 to these stipulations.

VIII.

On July 21, 1980, William Patrick Kennedy executed a beneficiary designation form for the Du-Pont Tax Reform Act Stock Ownership Plan ("TRA-SOP") naming Liv Kennedy as his sole beneficiary. The parties agree that a true and correct copy of this designation is attached as Exhibit 4 to these stipulations.

IX.

William Patrick Kennedy did not name any contingent beneficiaries for either the SIP or the TRASOP.

X.

William Patrick Kennedy never executed any forms or documents to remove or replace Liv Kennedy as his sole beneficiary under either the SIP or the TRASOP.

XI.

The TRASOP merged into the SIP before the death of William P. Kennedy and thereafter has been generally referred to as the SIP.

XII.

Liv Kennedy has collected proceeds from the SIP.

XIII.

On March 31, 2001, the SIP contained a balance of $402,152.56.

XIV.

On April 16, 2001, The Last Will and Testament of William P. Kennedy was admitted to probate by the County Court of Tyler County, Texas under Cause Number 7573. The parties agree that a true and correct copy of the Order Admitting Will to Probate and Authorizing Letters Testamentary is attached as Exhibit 5 to these stipulations.

XV.

The parties agree that a true and correct copy of the Last Will and Testament of William Patrick Kennedy is attached as Exhibit 6 to these stipulations.

XVI.

On April 16, 2001, Kari Kennedy was appointed and qualified as the Independent Executrix of the Estate of William Patrick Kennedy, Deceased. The parties agree that a true and correct copy of Kari Kennedy's Letters Testamentary is attached as Exhibit 7 to these stipulations.

XVII.

On December 20, 2001, Kari Kennedy, as the Independent Executrix of the Estate of William P. Kennedy, Deceased, filed a United States Estate (and Generation-Skipping Transfer) Tax Return for the

Estate of William P. Kennedy, Deceased. The parties agree that a true and correct copy of this return is attached as Exhibit 8 to these stipulations.

XVIII.

On December 26, 2001, Kari Kennedy, as the Independent Executrix of the Estate of William P. Kennedy, Deceased, paid Estate taxes in the amount of $105,768.00 to the United States Treasury. The parties agree that a true and correct copy of the check paid to the United States Treasury is attached as Exhibit 9 to these stipulations.

XIX.

On March 27, 2001, Kari Kennedy, as the Independent Executrix of the Estate of William P. Kennedy, Deceased, received a closing letter from the Internal Revenue Service for the Estate of William Patrick Kennedy, Deceased. The parties agree that a true and correct copy of the closing letter is attached as Exhibit 10 to these stipulations.

XX.

On December 20, 2001, Kari Kennedy, as the Independent Executrix of the Estate of William P. Kennedy, Deceased, filed an Inheritance Tax return – Federal Estate Tax Credit with the State of Texas. The parties agree that a true and correct copy of this return is attached as Exhibit 11 to these stipulations.

XXI.

On December 26, 2001, Kari Kennedy, as the Independent Executrix of the Estate of William P. Kennedy, Deceased, paid Inheritance taxes in the amount of $35,370 to the State Comptroller for the State of Texas. The parties agree that a true and correct copy of the check paid to the State Comptroller for the State of Texas is attached as Exhibit 12 to these stipulations.

XXII.

On July 23, 2002, Kari Kennedy, as the Independent Executrix of the Estate of William P. Kennedy, Deceased, received an Inheritance Tax Receipt from the State Comptroller for the State of Texas for the Estate of William Patrick Kennedy, Deceased. The parties agree that a true and correct copy of the Receipt is attached as Exhibit 13 to these stipulations.

XXIII.

The parties agree that a true and correct copy of "Your DuPont Benefit Resources: Savings and Investment Plan," the Summary Plan Description applicable to the SIP in March 2001, as amended, is attached as Exhibit 14 to these stipulations.

XXIV.

The parties agree that a true and correct copy of the "Savings and Investment Plan" in effect in March 2001 is attached as Exhibit 15 to these stipulations.

XXV.

The foregoing Stipulation of Fact is complete and contains the entire stipulation between and among the parties. No fact not specifically mentioned herein is to be construed as contained within this stipulation.

Respectfully submitted,

THOMPSON & KNIGHT, L.L.P.
Attorneys for Plaintiff

By: /s/ Stacy L. Kelly
STACY L. KELLY, Of Counsel
State Bar No.

333 Clay Street, Suite 3300
Houston, Texas 77002-4499
Telephone: (713) 654-8111
Telecopier: (713) 654-1871

MEHAFFY WEBER, P.C.
Attorneys for Defendant

By: /s/ Elizabeth Pratt
ELIZABETH B. PRATT,
Of Counsel
State Bar No. 16239450

Post Office Box 16
Beaumont, Texas 77704
Telephone: 409/835-5011
Telecopier: 409/835-5177

CHAMBERS, TEMPLETON,
CASHIOLA, THOMAS, L.L.P.
Attorneys for Third Party Defendant

By: /s/ Dean Brinkley
P. DEAN BRINKLEY, Of Counsel
State Bar No. 00793388
by permission

2090 Broadway
Beaumont, Texas 77701
Telephone: 409/835-5800
Telecopier: 409/835-5880

EXHIBIT 4

TR-9570-C DU PONT TAX REFORM ACT STOCK OWNERSHIP PLAN (TRASOP) BENEFICIARY DESIGNATION

xxx | xx | xxxx	66	75	20	00	TX	Kennedy,	William P.	3040	
SOC. SEC. NO.	DEPT.	DIV.	SECT. LOCA-TION	UNIT	STATE	LAST	FIRST OR INITIAL EMPLOYEE'S NAME	MIDDLE OR INITIAL	

PPD	Mfg.	Sabine River Works
DEPARTMENT	DIVISION	PLANT OR OFFICE

I hereby name the beneficiary(ies) recorded below with right to change as stated in the Company's TRASOP plan, Section VIIIA. It is expressly understood, unless otherwise specifically provided, that (1) if more than one beneficiary is named, any proceeds under such Plan will be paid in equal shares to the designated beneficiaries who survive me and (2) if no such beneficiary survives me, payment will be made to my estate.

☐ This form is a replacement of a previous beneficiary designation form and as such supersedes any previous beneficiary designations.

/s/ Betty Osborne — Witness to Employee's Signature

7-21-80 — Date

/s/ ✓William P. Kennedy — Signature of Employee as Usually Written

Witness to Spouse's Signature

Date

Signature of Employee's Spouse if Employee Resides in a Community Property State

xxxxx — Employees Street Address

xxxxx, xx xxxxx — City State and Zip Code

Approved for: E. I. DU PONT DE NEMOURS & COMPANY

By /s/ C.W. Copeland — Signature of Authorized Signer

☐ Change of Employee Name from: — Full Former Name

BENEFICIARY DESIGNATION, RELATIONSHIP AND ADDRESS

Show names in full. Use of maiden name as middle name facilitates identification. Name should be written "Mary Smith Jones," not "Mrs. Henry A. Jones," nor "Mary Helen Jones." Please indicate relationship of beneficiary(ies) to employee, beneficiary's(ies') Social Security number(s) and complete address(es), if other than that of employee.

TO WIFE, LIV WILSGAARD KENNEDY

EXHIBIT 7

No. 7573

Letters Testamentary

The State of Texas	**IN COUNTY COURT.**
County of Tyler	Tyler *County, Texas,*

I, DONECE GREGORY *Clerk of the County Court of* Tyler *County, Texas, do hereby certify that on the* 16th *day of* April *A.D.* 2001 Kari Ellen Kennedy Duckworth *was duly granted by said Court Letters Testamentary of the Estate of* WILLIAM PATRICK KENNEDY *deceased and that she qualified as such* Independent Executrix *of said Estate on the* 16th *day of* April *A.D.* 2001 *as the law requires, and that said appointment is still in full force and effect.*

Witness my hand seal of office at Woodville *this* 7th *day of* November *A.D.* 2001

DONECE GREGORY *Clerk,*

County Court, Tyler *County, Texas.*

By Jean Jordan *Deputy.*
Jean Jordan

EXHIBIT 8

Estate Return

Prepared for:
WILLIAM P. KENNEDY

Neil Chamberlain
Certified Public Accountant

* * *

KENNEDY706
12/20/2001 7:40 AM

Form 706
(Rev. July 1999)

Department of
the Treasury
Internal Revenue Service

United States Estate (and Generation-Skipping) Transfer (Tax Return)

Estate of a citizen or resident of the United States (see separate Instructions).
To be filed for decedents dying after December 31, 1998.
For Paperwork Reduction Act Notice, see page 1 of the separate Instructions.

OMB No. 1545-0015

Decedent and Executor

1a Decedent's first name and middle initial (and maiden name, if any)	1b Decedent's last name	2 Decedent's SSN
WILLIAM P.	KENNEDY	XXX-XX-XXXX

3a Legal residence (domicile) at time of death (county, state, and ZIP code, or foreign country)	3b Year domicile established	4 Date of birth	5 Date of death
TYLER, TX 77624	1994	xxxx/xxxx	3/27/01

6a Name of executor (see page 4 of the instructions)	6b Executor's address (number and street including apartment or suite no. or rural route; city, town, or post office; state; and ZIP code)
KARI ELLEN KENNEDY	xxxx xxxxx xxxxx xxxxx xx xxxxx
6c Executor's social security number (see page 4 of the instructions) XXX XX XXXX	

7a Name and location of court where will was probated or estate administered	7b Case number
DONECE GREGORY, COUNTY CLERK TYLER COUNTY, TEXAS	7573

8 If decedent died testate, check here ►	X	and attach a certified copy of the will.	9 If Form 4768 is attached, check here ►	

10 If Schedule R-1 is attached, check here ►

Part 2 Tax

1	Total gross estate less exclusion (from Part 5, Recapitulation, page 3, item 12)		1	1,330,884
2	Total allowable deductions (from Part 5, Recapitulation, page 3, item 23)		2	262,133
3	Taxable estate (subtract line 2 from line 1)		3	1,038,751
4	Adjusted taxable gifts (total taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts that are includible in decedent's gross estate (section 2001(b)))		4	
5	Add lines 3 and 4		5	1,038,751
6	Tentative tax on the amount on line 5 from Table A on page 12 of the instructions		6	361,688
7a	If line 5 exceeds $10,000,000, enter the lesser of line 5 or $17,184,000. If line 5 is $10,000,000 or less, skip lines 7a and 7b and enter -0- on line 7c	7a		
b	Subtract $10,000,000 from line 7a	7b		
c	Enter 5% (.05) of line 7b		7c	0

Computation						
	8 Total tentative tax (add lines 6 and 7c)				8	361,688
	9 Total gift tax payable with respect to gifts made by the decedent after December 31, 1976. Include gift taxes by the decedent's spouse for such spouse's share of split gifts (section 2513) only if the decedent was the donor of these gifts and they are includible in the decedent's gross estate (see instructions)				9	
	10 Gross estate tax (subtract line 9 from line 8)				10	361,688
	11 Maximum unified credit (applicable credit amount) against estate tax	11	220,550			
	* * *					
	25 United States Treasury bonds redeemed in payment of estate tax	25				
	26 Total (add lines 24 and 25)				26	
	27 Balance due (or overpayment) (subtract line 26 from line 23)				27	105,768

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer other than the executor is based on all information of which preparer has any knowledge.

Signature(s) of executor(s)	KARI ELLEN KENNEDY	Date
/s/ Neil Chamberlain CPA	Richard Chamberlain	
	PO Box 1341	12/20/01
Signature and Address (and ZIP code) of preparer other than executor	Jasper, TX 75951-1341	Date

Form 706 (Rev. 7-99)

Estate of: WILLIAM P. KENNEDY xxx-xx-xxxx

SCHEDULE C – Mortgages, Notes, and Cash
(For jointly owned property that must be disclosed on Schedule E, see the instructions for Schedule E.)

Item Number	Description	Alternate valuation date	Alternate value	Value at date of death
1	Citizens State Bank # xxxxxx Checking Woodville, TX	9/27/01	1,062	1,062
2	Merrill Lynch CMA Acct# xxx-xxxxx	9/27/01	26,943	26,943
3	Citizens State Bank #xxxxx Checking Woodville, TX	8/27/01	25,958	25,958
4	Dupont SRW Employees FCE 4418-08 Savings, Orange, TX	9/27/01	162	162
5	ML Dupont Savings & Investment Plan	9/27/01	395,255	395,255
Total from continuation schedules (or additional sheets) attached to this schedule.....				

TOTAL. (Also enter on Part 5, Recapitulation, page 3, at item 3.)	449,380	449,380

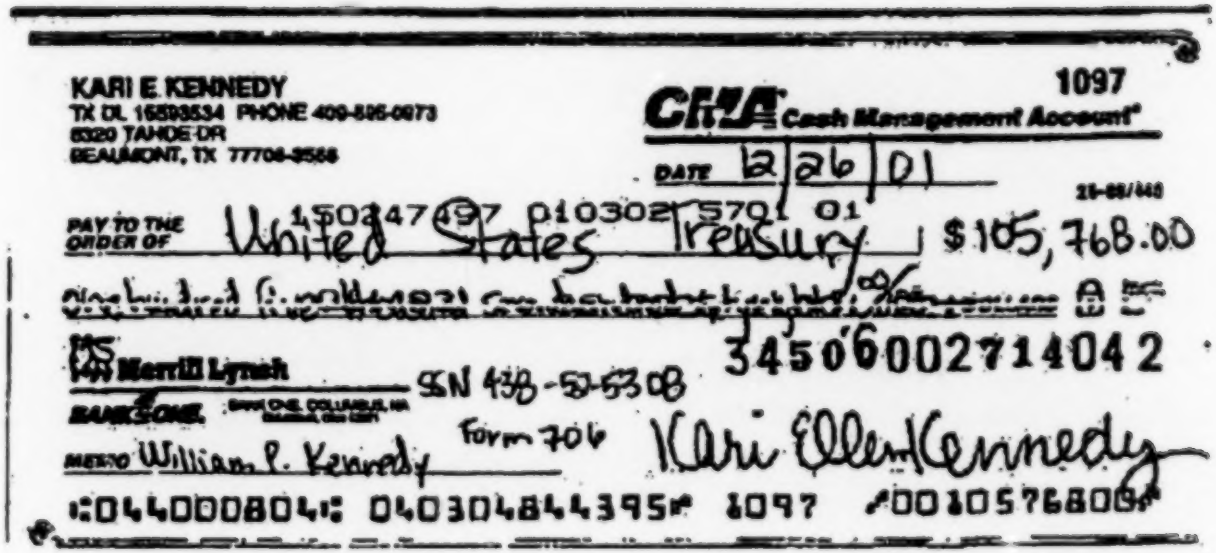
(If more space is needed, attach the continuation schedule from the end of this package or additional sheets of the same size.)

(See the instructions on the reverse side.)

There are no continuation schedules attached

Schedule C

EXHIBIT 9



KARI E. KENNEDY
TX DL 16593534 PHONE 409-835-0873
6320 TAHOE DR
BEAUMONT, TX 77706-3568

1097

CMA Cash Management Account®

DATE 12/26/01

PAY TO THE ORDER OF United States Treasury $105,768.00

Merrill Lynch

BANK ONE

SN 438-52-5308

3450 6002 7140 42

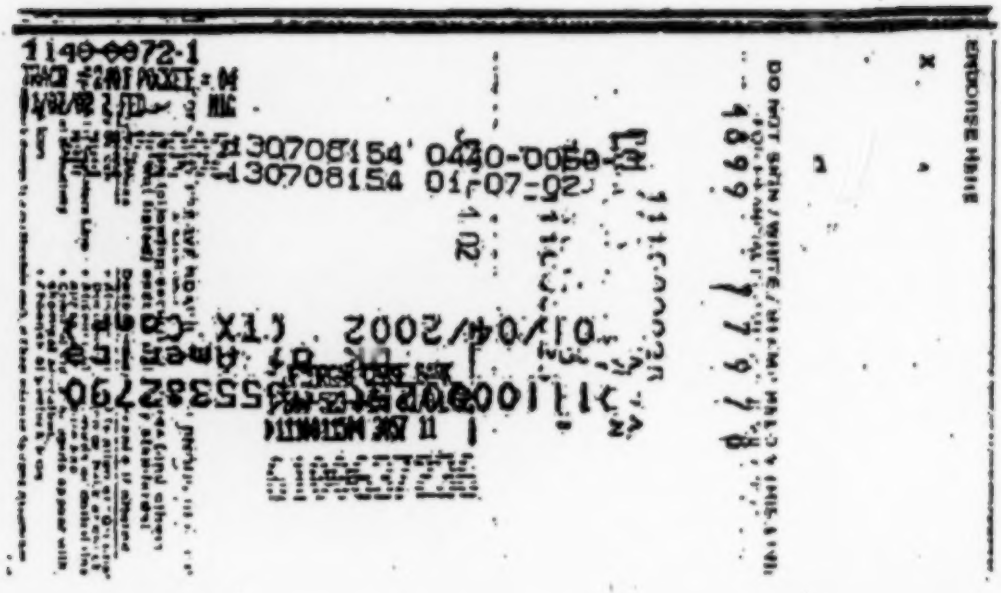
MEMO William P. Kennedy Form 706

Kari Ellen Kennedy

:044000804: 040304844395# 1097 #00105768008#

BEST AVAILABLE COPY

EXHIBIT 12



KARI E KENNEDY
TX DL 19893634 PHONE 409-835-0973
6320 TAHOE DR
BEAUMONT, TX 77706-3568

1098

CMA Cash Management Account

DATE 2/26/01

130708154 010702 5042 01

PAY TO THE ORDER OF State Comptroller $35,370.00

thirty-five thousand three hundred seventy 00/100 DOLLARS

Merrill Lynch SSN 438-52-5308

BANK ONE Form 17-104

MEMO William P. Kennedy Kari Ellen Kennedy

:044000804: 040304844395# 1098 #00035370004#

EXHIBIT 14

[19] **Details of the Plan**

VESTING

You are always immediately vested in (that is, have a nonforfeitable right to) your own contributions to the plan and all investment earnings. After five years of Company service, you are vested in all Company contributions to your account.

IF YOU ARE REEMPLOYED

If you terminated plan participation or left DuPont for any reason after you were eligible to participate in SIP, you will be immediately eligible to participate in SIP again if you are reemployed.

IF YOU DIE

If you die before receiving your SIP account balances, your designated beneficiary(ies) will receive the balance in your accounts. Federal law requires that, *if you are married*, your spouse be designated as sole beneficiary of your plan assets upon your death unless:

- your spouse has consented in writing to your naming another beneficiary (the law requires that the consent be witnessed by a notary public), or
- the consent cannot be obtained because your spouse cannot be located.

Spousal consent is not required if you and your spouse are legally separated or if you have been abandoned (within the meaning of local law) unless a Qualified Domestic Relations Order provides otherwise.

You may also designate an irrevocable trust as the beneficiary of your SIP assets. However, such a trust will be treated by the plan as a non-spouse beneficiary, even if your spouse is the sole beneficiary of the trust.

Whether your spouse is your sole beneficiary or one of several beneficiaries, he or she may be able to elect a total payout, periodic payments, or to defer payout until December of the year in which you would have reached age 70½, or December of the year after the year in which you died, whichever is later.

All other beneficiaries (including trusts) have up to 12 months to receive their share, which will be paid in a lump sum.

If you were repaying a loan via deductions from your pension check when you died, any remaining loan balance is automatically deducted from your account balances as of the month of death.

If you have no surviving spouse and no beneficiary has been named, distribution is made to your estate.

SALE OR OUTSOURCNG [sic] OF BUSINESS

If your plan participation is terminated because of the sale of a business or facility and you accept

employment with the buyer, you may be permitted to transfer part or all of your accounts to the buyer's plan, or you may elect to take full distribution of your accounts. You may also elect to defer payout until shortly after age 70½.

The arrangements for handling SIP account balances can differ in these situations. Therefore, it is very important to review carefully all of the information provided to you if you are affected by a sale or outsourcing so that you understand exactly what options are available to you.

KEEPING TABS ON YOUR ACCOUNT

Your savings in the SIP and DuPont's matching contributions are invested for you by the plan trustee. Following the end of each calendar quarter, Merrill Lynch will mail you a statement summarizing the activity in your account during the quarter and your account balances.

EXHIBIT 15

* * *

[21] (3) a written authorization for Loan repayment by means of payroll deductions or other method of repayment acceptable to the Plan Administrator,

(4) an authorization to transfer an amount described in Sec. VIII.2 to Fund L, and

(5) the consent required by Section XIII.7.(b)(1).

(e) A "qualified residential Loan" is a Loan used to acquire or construct any dwelling unit which within a reasonable time (determined at the time the Loan is made) is to be used as a principal residence of the Participant.

(f) All Participants granted Loans under this Section shall receive a statement disclosing the terms of the Loan, including the interest rate, amount of interest to be paid over the term of the Loan and payment conditions (disclosure statement).

(g) No Loan may be granted that would adversely affect the status of the Plan as one which qualifies under Section 401(a) or 401(k) of the Code or the status of the trust as one

which is exempt from Federal income tax under Section 501(a) of the Code.

(h) Notwithstanding anything above to the contrary, the Loan Administrator may deny a Loan if in its judgment the Participant will not have sufficient income to meet his Loan payments as they become due.

(i) The Loan Administrator is responsible for the administration of the loan program described in this section.

XIV. WITHDRAWALS

1. General Conditions

(a) In addition to a distribution pursuant to Section XVI. 1 an account holder may make three withdrawals in any calendar year under the provisions of this Section from his Regular and/or Before-Tax Accounts. Withdrawals shall not be permitted:

(i) from the Before-Tax Account before the Participant attains age 59 1/2, becomes disabled, or incurs a hardship, or

(ii) from Fund L except as provided in Section XIII.7.

* * *

[29] (c) Beneficiary Designation

(1) A Participant, Former Participant, Retired Participant or Spouse Beneficiary may designate any beneficiary or beneficiaries he chooses to receive all or part of his interests in Funds B, C, D, E and F in case of his death, and he may replace or revoke such designation. However, in the event the Participant, or Spouse Beneficiary has a spouse, no designation of a person other than the spouse shall be permitted, unless such spouse has consented in writing in the manner prescribed by the Company to another beneficiary, or such consent could not be obtained because the spouse could not be located or because of such other reasons as applicable Treasury Regulations may provide in which case distribution shall be made as provided in Paragraph 4(a) of this Section. If no surviving spouse exists and no beneficiary designation is in effect, distribution shall be made to, or in accordance with the directions of, the executor or administrator of the decedent's estate.

With respect to non-Spouse Beneficiaries (including a beneficiary who is a spouse of a Former Participant), the balance of a deceased Participant's, Former Participant's, Alternate Payee's or Retired Participant's Plan assets will remain in the accounts and Funds as of the time of his death, pending distribution. Total distribution shall be made to such beneficiaries no later than the end of the sixtieth month following the death of the Participant, Former Participant, Alternate Payee or Retired Participant.

If in the opinion of the Company there is a question as to the legal right of any beneficiary to receive a distribution under the Plan, the amount in question may be paid to the decedent's estate, in which event the Trustee and the Company shall have no further liability to anyone with respect to such amounts. Non-Spouse Beneficiaries may not designate beneficiaries; account balances remaining at the time of their death will be paid to their estates as soon as practicable following the death of the Non-Spouse Beneficiary.

(2) If the Plan Administrator receives a qualified disclaimer (as defined in Code section 2518) from any designated beneficiary entitled to benefits as a result of, and within nine months after, the death of a Participant, Former Participant, Spouse Beneficiary, Alternate Payee or Retired Participant, such benefits shall instead be paid to an

* * *

[39] (5) A Participant who terminates employment with the Company and does not receive a distribution from the Plan shall not have his unvested Company Contributions forfeited until he has incurred five consecutive One-Year Breaks in Service commencing with his termination.

7. Computation Period

For purposes of this Section, a computation period shall be a period of 12 consecutive months commencing the later of January 1, 1976, or the employee's date of employment or reemployment, whichever is applicable, or any succeeding anniversary of such date.

XVII. NONASSIGNMENT

Except as provided by Section 401(a)(13) of the Code, no assignment of the rights or interests of account holders under this Plan

will be permitted or recognized, nor shall such rights or interests be subject to attachment or other legal processes for debts.

XVIII. OPERATION OF THE PLAN AS A TOP-HEAVY PLAN

If it is determined that the Plan is a top-heavy plan, within the meaning of Section 41 6(g) of the Code, for any plan year, this Section will supersede all other provisions to the contrary and apply for such plan year.

1. Minimum Vesting

Each Participant shall have a nonforfeitable right to a percentage of the Company Contributions and earnings thereon in his Regular Account, as determined in accordance with the following table:

Years of Participation	Nonforfeitable Percentage
2 but less than 3	20%
3 but less than 4	40%
4 but less than 5	60%
5 and greater	100%

For purposes of determining the years of participation of a reenrolled Participant, the provisions of Sections XVI.6 (a) and (b) shall apply. Vesting of nonforfeitable rights to Company Contributions accrued after

* * *

[41] XIX. MISCELLANEOUS PROVISIONS

1. Plan Administration

(a) The Company shall have the authority to control and manage the operation and administration of the Plan and to designate one or more persons to carry out the responsibilities of the operation and administration of the Plan. The named fiduciary for the investment aspects of the Plan is the Vice President, Pension Fund Investment; the named fiduciary for all other aspects of the Plan is the Director, Compensation and Benefits. The named fiduciary for the investment aspects of the Plan may appoint an investment manager or managers to manage all or some of the assets invested in Fund B, and, by such appointment, unless specifically excluded in any agreement with such investment manager, delegates to such investment manager or managers the power to appoint additional investment managers with respect to all or part of the assets managed by such investment manager.

(b) All authorizations, designations and requests concerning the Plan shall be made by employees in the manner prescribed by the Company.

(c) The Company, or its designee by written instrument, shall have the responsibility of appointing Trustees, as provided in Paragraph 1 of Section IX, Paragraph 1(a) of Section X, Paragraph 1 of Section XI and Paragraph I of Section XII, and the Compensation and Benefits Committee, or its designee by written instrument, shall have the responsibility of making the designations called for pursuant Paragraph 1(b) of Section X.

(d) The Company retains discretionary authority to determine eligibility for benefits hereunder and to construe the terms and conditions of the Plan. The decision of the Company shall be final with respect to any questions arising as to interpretation of this Plan.

(e) The Company is the Plan Administrator.

(f) Subject to the requirements of the Code, the Company may authorize the Trustees of the Plan to accept a rollover of assets in cash and/or Company common stock received in a qualified distribution from a qualified employer plan as described in Code Sec. 402(a)(5), or received in a distribution from an individual retirement account, as described in Code Sec. 408(d)(3)(A)(ii). Any

Company common stock received will be allocated to Regular Account Fund D. The Account Holder shall designate the manner

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED	§	
vs.	§	CIVIL ACTION NO. 1:01CV-904
E. I. DUPONT DE NEMOURS AND COMPANY AND PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN	§	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

(Filed Apr. 2, 2004)

* * *

EXHIBIT A

THRIFT PLAN BENEFICIARY DESIGNATION

xxx | xx | xxxx	William P. Kennedy		3040
Social Security Number	EMPLOYEE NAME	SALARY	WAGE
Plastics	Manufacturing	Sabine River Works	
DEPARTMENT	DIVISION	PLANT OR OFFICE	

I hereby name the beneficiary(ies) recorded on the reverse side hereof with right to change as stated in the Thrift Plan as amended by action of the Board of Directors on June 18, 1973. It is expressly understood, unless otherwise specifically provided, that if (1) more than one beneficiary is named, any proceeds under such Plan will be paid in equal shares to the designated beneficiaries who survive me and (2) if no such beneficiary survives me, payment will be made in accordance with the provisions of the Plan.

☐ This form is a replacement of a previous beneficiary designation form and as such supersedes any previous beneficiary designations.

/s/ JoAnn Sterling
Witness to Employee's Signature

/s/ William P. Kennedy — 12-6-74
Signature of Employee as Usually Written — Date

Witness to Spouse's Signature

Signature of Employee's Spouse if Employee Resides in a Community Property State — Date

☐ Change of Employee Name from:

Full Former Name

xxxxx
Street Address

xxxxx, xxxxx xxxxx
City, State and Zip Code

Approved for:
E. I. DU PONT DE NEMOURS & COMPANY

By
Signature of Authorized Signer

PREPARE IN TRIPLICATE WITH INK OR TYPEWRITER
ORIGINAL - Payrolls & Insurance Section, Wilmington
DUPLICATE - Employment Point AND TRIPLICATE - Employee

BENEFICIARY DESIGNATION, RELATIONSHIP AND ADDRESS

Name should be written "Mary Helen Jones," not "Mrs. Henry A. Jones." Relationship of beneficiary(ies) to employee and complete address(es), if other than that of employee, must be shown:

Liv G. Kennedy-Wife

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KARI ELLEN KENNEDY,	§	
INDEPENDENT EXECUTRIX	§	
OF THE ESTATE OF	§	
WILLIAM PATRICK	§	
KENNEDY, DECEASED	§	
VS.	§	**CIVIL ACTION**
	§	**NO. 1:01CV-904**
E.I. DUPONT DE NEMOURS	§	
AND COMPANY AND	§	
PLAN ADMINISTRATOR	§	
FOR DUPONT SAVINGS	§	
AND INVESTMENT PLAN	§	

LIV KENNEDY'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND THIRD-PARTY PLAINTIFF'S ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

(Filed May 21, 2004)

* * *

COUNTRY OF NORWAY	§	
	§	**AFFIDAVIT**
STAVANGER	§	

BEFORE ME, the undersigned Notary Public, personally appeared LIV KENNEDY, known to me or proved to me to be the person whose name is subscribed below, who being by me duly sworn, deposed as follows:

"My name is LIV KENNEDY, I am over the age of 18 years, of sound mind, capable of making this Affidavit, and personally acquainted with the facts stated herein.

"When I was notified about the Dupont Savings and investment Plan by my daughter during our phone conversation after her father's death, I had forgotten all about the account. After talking with my daughter on the phone I received two letters from Merrill Lynch confirming in my mind that I was the beneficiary of the account. I thought back on the day that William had taken me with him to have me named as beneficiary and I thought to myself that this is what he had intended for me to have. I ended up withdrawing the funds from the account and spending the money. I spent the money thinking the whole time that it was mine to spend. I continued receiving account statements in the mail from Merrill Lynch showing me as the account owner and reporting all of the account activity to me. I knew my daughter wanted me to relinquish my rights as beneficiary so that the estate could get the proceeds, but I did not know there was a dispute over who owned the account until my lawyer explained the lawsuit to me.

"Further Affiant Sayeth Not."

/s/ Liv Kennedy

LIV KENNEDY

Given under my hand and seal of office this 25 day of May , 2004.

[SEAL]

/s/ [Illegible]
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED	§	
vs.	§	CIVIL ACTION
	§	NO. 1:01CV-904
E. I. DUPONT DE NEMOURS AND COMPANY AND PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed May 21, 2004)

* * *

EXHIBIT F

7/14/94

[LOGO] COMPANY-PAID SURVIVOR BENEFITS (PRE-RETIREMENT) [LOGO]
SECTION VI OF THE PENSION AND RETIREMENT PLAN
(FOR EMPLOYEES UNDER AGE 55 WITH AT LEAST 15 YEARS SERVICE)

EMPLOYEE INFORMATION

Name WILLIAM (First) P. (Middle) KENNEDY (Last) Soc. Sec. No. xxx-xx-xxx

Birth Date xx-x-xx (Month/Day/Year) A.B.D. x-xx-xx (Month/Day/Year) Roll: ☐ Ex. Bal. ☒ Nonex. Bal. ☐ Wage

Department & Site NYLON-SABINE Code 01 (Dept.) 2381 (Site)

Marital Status: ☐ Married ☒ Single

The following election revokes and supersedes any and all previous designations.

I hereby specify the person(s) named below as beneficiary(ies) to receive survivor benefits as provided in the Pension and Retirement Plan following my death. (*Check the appropriate letter.*)

___ (a) Spouse ___ (b) Spouse and all minor children X (c) Spouse and minor children as specified
___ (d) Specified minor children ___ (e) Parent or stepparent

NOTE IF YOU ARE MARRIED AND HAVE *NOT* SPECIFIED YOUR SPOUSE AS THE BENEFICIARY IN (a), (b) OR (c), ABOVE, A VALID SPOUSE WAIVER FOR THE COMPANY-PAID BENEFIT MUST BE ON FILE OR THE WAIVER CLAUSE AS SHOWN BELOW MUST BE COMPLETED.

SPECIFICATION OF BENEFICIARIES

Use full name, Using maiden name as middle name facilitates identification. Name of female spouse should be written "Mary Smith Jones" not "Mary Helen Jones", Never "Mrs. Henry A. Jones" or "Mrs. H.A. Jones", Proof of date(s) of birth will be required by the Company when application is made for payment.

Name	Relationship	Soc. Sec. No.	Date of Birth
/s/ KARI ELLEN KENNEDY	DAUGHTER	xxx-xx-xxx	xx-xx-xx

/s/ Judy L. [Illegible]
Witness to Employee's Signature

/s/ William P. Kennedy
Employee's Signature

Date 6-7-94

xxxxx xxxxx
Number Street

xxxxx xx xxxxx
City State Zip Code

/s/ [Illegible]
Authorized Signature for
E.I. du Pont de Nemours and Company

Date 7-14-94

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WAIVER (If waiver completed, only original copy must be notarized.)

I, _____, the participant's spouse, hereby acknowledge that I have read the notification on the reverse side regarding Company-paid survivor benefits under the DuPont Pension and Retirement Plan and consent to waive my right to receive such benefits as the participant's spouse under the Retirement Equity Act. I also understand that my spouse has authority to specify a beneficiary without my knowledge or consent and that I will not receive any benefits under the Plan unless specified as a beneficiary by my spouse.

State of _____ County of _____

Signed and [illegible] before me on

_____ day of _____, 19____ _____

Signature of Spouse

_____ _____

[Illegible] Tax and [Illegible] Signature of [Illegible] Officer
(A [Illegible])

My commission expires: _____

PREPARE IN TRIPLICATE WITH INK OR TYPEWRITER
Original-Finance Department, Payroll Division, Pension Administration Unit
1 copy – Employment Unit File
1 copy – Employee

(See Reverse Side)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KARI ELLEN KENNEDY,	§	
INDEPENDENT EXECUTRIX	§	
OF THE ESTATE OF	§	
WILLIAM PATRICK KENNEDY,	§	
DECEASED	§	CIVIL ACTION
	§	NO. 1:01CV-904
vs.	§	
E. I. DUPONT DE NEMOURS	§	
AND COMPANY AND	§	
PLAN ADMINISTRATOR	§	
FOR DUPONT SAVINGS	§	
AND INVESTMENT PLAN	§	

DEFENDANTS' RESPONSE TO PLAINTIFF EXECUTRIX'S OBJECTIONS TO THE AFFIDAVIT OF DEFENDANTS' WITNESS MARY D. DINEEN

(Filed Jun. 14, 2004)

* * *

EXHIBIT G

AMENDED AFFIDAVIT

(Filed Jun. 14, 2004)

STATE OF DELAWARE	§	
	§	
COUNTY OF NEW CASTLE	§	

BEFORE ME, on this day, personally appeared MARY D. DINEEN, the individual whose name is

subscribed below, and who, upon being placed under oath, did state as follows:

1. My name is Mary D. Dineen. I am the Senior Consultant, Wealth Accumulation Plans for E. I. du Pont de Nemours and Company ("DuPont"), responsible for oversight of the DuPont Savings and Investment Plan ("SIP") and the DuPont pension plan. **In my position, which I have held for two years, I am responsible for monitoring and maintaining the overall design of these plans, responding to questions of policy and plan provision interpretation that arise in the course of the operation of these plans, and for strategic oversight of the administration of these plans by the third party firms that, pursuant to contract with DuPont, review and process claims for payment of benefits under these plans. Accordingly, I work regularly with the employees of the third party vendors who administer these plans for DuPont on a contracted basis, and I respond to questions concerning application of the written plan provisions to questions that arise in connection with identifying proper plan account payees for both of these plans. I am familiar with the provisions of the written plan documents for both the SIP and the DuPont pension plan due to my daily job responsibilities. Before taking my current position, I worked as the Administrative Manager for the SIP**

and DuPont pension plan for two years. In that position, I was responsible for overseeing the day to day administration of both the SIP and DuPont pension plan, which included daily coordination of plan operations with third party service providers and answering questions about distribution decisions. All facts set forth in this affidavit are true and correct and are based on my personal knowledge, except where expressly stated otherwise. I am providing this testimony subject to penalties of perjury.

2. On five occasions, Liv Kennedy has requested that benefits from the SIP account of William Patrick Kennedy be paid out to her. Benefits from the SIP were paid to Liv Kennedy at her request on or about August 1, 2001, August 31, 2001, November 9, 2001, January 23, 2002, and July 31, 2002 in an amount totaling $414,143.22. **I verified these transactions by reviewing the transaction records available to me on Merrill Lynch's database, to which I have direct access.**

3. The SIP funds were paid to Liv Kennedy upon her request because William Patrick Kennedy had designated her as the beneficiary for the SIP funds. **Benefits were paid pursuant to the written SIP provisions in the regular course of operation of the SIP. The Summary Plan Description for the SIP expressly provides, "If you die before receiving your SIP account**

balances, your designated beneficiary(ies) will receive the balance in your accounts." This is contained on page 19 of The Summary Plan Description. Payments were made to Liv Kennedy because the provisions of the SIP also expressly require payment to the designated beneficiary. This is memorialized in Section XVI(4)(c) of the plan, which provides:

> **(c) Beneficiary Designation**
>
> > **(1) A Participant, Former Participant, Retired Participant or Spouse Beneficiary may designate any beneficiary or beneficiaries he chooses to receive all or part of his interests in Funds B, C, D, E and F in case of his death, and he may replace or revoke such designation.**

The plan provisions I have quoted appear on page 29 of the Savings And Investment Plan document. Further, Liv Kennedy did not notify the SIP that she was no longer a proper beneficiary or had knowingly or voluntarily waived her right to the SIP benefits. **I have reviewed the benefit plan file of William Patrick Kennedy which contained Mr. Kennedy's beneficiary designations for the benefit plans in which Mr. Kennedy participated. The benefit plan file was**

created and maintained by employees of DuPont for the purpose of identifying the beneficiary designations made by Mr. Kennedy. It was within the regular course of the business practices of DuPont to keep and maintain a file of the beneficiary designations made by Mr. Kennedy. It was also within the regular course of business for an employee of DuPont, based on that employee's personal knowledge, to transmit and retain either the originals or true and correct copies of such beneficiary designations upon creation by the signer of the designations and/or to transmit the information contained in the beneficiary designations to be maintained as part of the records of DuPont, either at the time the designation was created or reasonably soon thereafter. Had Liv Kennedy disclaimed her designation as the beneficiary of Mr. Kennedy's SIP, that declination or disclaimer, or a copy thereof, would have been included in the beneficiary designation file maintained for Mr. Kennedy. Upon review of that file, I found no beneficiary designation forms replacing Liv Kennedy as Mr. Kennedy's SIP beneficiary, nor did I find any disclaimer or declination by Liv Kennedy requesting or attempting to disclaim or remove herself as the beneficiary for Mr. Kennedy's SIP account.

4. Through the date of this Affidavit, Liv Kennedy has not been required by either E. I. du Pont de Nemours and Company or the Plan Administrator for the DuPont SIP to accept funds from the SIP under the terms of the plan. **In the normal course of SIP operations, for the first five years after the participant dies, benefits are paid only upon request from a designated beneficiary. Under the SIP provisions, when the designated beneficiary makes a request for payment, payment is then made by Merrill Lynch, contractually the third party recordkeeper, responsible for making such payments. The SIP documents make no provision for paying accounts over $5,000 to a beneficiary during their first five years of eligibility unless the beneficiary requests withdrawal.**

5. Liv Kennedy has not returned any funds to the SIP which were paid to her from that plan. **This statement is based on my review of the transactional records generated by Merrill Lynch, the SIP third party recordkeeper, that were provided to DuPont by Merrill Lynch. The Merrill Lynch transactional statements which I reviewed reflect the activity in the SIP account of William Patrick Kennedy for all quarters since April 2001.**

6. Liv Kennedy has not notified the SIP or its administrator that she is not the proper SIP beneficiary for the SIP account of William

Patrick Kennedy. Liv Kennedy has not notified the SIP that she knowingly or voluntarily intended to waive her rights to the SIP benefit as part of her divorce from William Patrick Kennedy. **I base these statements on my review of the file of beneficiary designations maintained by DuPont which I describe in Section No. 3 of this affidavit.**

7. **The SIP provisions define the "Plan Administrator" as DuPont. This is set forth at Section XIX(1)(e) of the SIP plan document.** The Plan Administrator made no representations to Liv Kennedy that the plan was distributing funds to her or that it was releasing them to her for any reason other than her claim for release of the benefits. **I have reviewed the records of DuPont which relate to the withdrawal of benefits from William Patrick Kennedy's SIP account, including the file containing Mr. Kennedy's beneficiary designations. Those records reflect that the SIP benefits were paid to Liv Kennedy as the designated beneficiary of William Patrick Kennedy.** In acting upon the claims, the Plan Administrator interpreted those claims as representations that Liv Kennedy was presenting herself as the proper plan beneficiary. **My review of the file of beneficiary designation records maintained by DuPont demonstrated that Liv Kennedy was the beneficiary designated by William Patrick Kennedy for his SIP account. The SIP account**

benefits were paid, as directed by the plan provisions quoted above in Section No. 3, to the designated beneficiary.

8. In the event that Liv Kennedy is not the correct beneficiary entitled to receive SIP proceeds, the SIP, acting through its Plan Administrator, seeks prompt repayment of the benefits paid out to Liv Kennedy. Such benefits would constitute an overpayment for which the plan is entitled to reimbursement within thirty days after written demand for repayment. (Section XIX(1)(j))

9. The Plan Administrator seeks reimbursement to comply with the provisions of the SIP and to protect the assets of the SIP in the interest of all plan beneficiaries and participants. If the funds paid to Liv Kennedy are not returned to the plan, this will result in a loss to the plan because the SIP will be required to pay the funds attributable to William Patrick Kennedy's account twice.

10. Participation in SIP is made available to all qualified DuPont employees who work throughout the United States.

11. SIP benefits were paid from the account of William Patrick Kennedy in accordance with the written content of the Savings and Investment Plan document. The Plan Administrator (**which is DuPont, as explained in Section No. 7 of this affidavit**) concluded that under that plan, Liv Kennedy was the proper payee of the SIP benefits because William Patrick Kennedy had designated her in

writing as his beneficiary and not submitted any revocations or redesignations in compliance with the plan. **The basis for the payment of SIP account benefits to Liv Kennedy is described in this affidavit in Sections Nos. 3, 6, and 7.**

12. **At the time the original affidavit was signed in March 2004,** the SIP had approximately 64,688 participants, including both active employees and former employees. Approximately 32,171 are active employee participants. DuPont conducts business in all 50 states. Former employee participants may reside in any country in the world in which they choose.

13. There are approximately 75,000 participants in all DuPont pension plans (including the SIP).

14. **Electronic record systems for SIP record individuals' status as either "married" or "single." The SIP does not currently record whether participants are divorced for any other purpose.** Divorce decrees are occasionally provided with QDROs, but that is not required. Divorce decrees or settlement agreements may be submitted in connection with qualified domestic relations orders ("QDROs"), although not all divorced participants request QDROs in connection with divorces.

15. To secure legal review of divorce decrees, the state statutes, and other relevant information and laws, the SIP would have to

seek legal review from the DuPont Legal Department. **In my position, I am responsible for ensuring that questions relating to SIP provision interpretation are answered. If I conclude that responding to a question requires a legal interpretation, I am not qualified to provide a legal interpretation because I am not a lawyer. Accordingly, I must look to DuPont's Legal Department for that legal interpretation. I am not authorized to secure a legal interpretation from any legal service or law firm other than the DuPont Legal Department. I know this based on my two years of experience in my current position; this is the actual practice I have followed.** For the entire DuPont company, there is only one attorney who is currently dedicated to handling SIP benefit and investment issues and who has the expertise necessary to provide informed counsel on questions of this nature. **I know this because I have been instructed by representatives of the DuPont Legal Department that I am to contact DuPont attorney Lori Knauer. Ms. Knauer has identified herself to me as the attorney in the DuPont Legal Department dedicated to addressing benefit issues, including benefit payment questions, arising under the SIP. This is the practice I have actually followed for the six years I have served in my current position.**

16. [Deleted. See Affidavit of Marsha Cauthen.]

17. Reviewing each divorce decree for compliance with waiver requirements could require a substantial amount of time by legal counsel. Referring the interpretive issues to legal counsel would delay the processing of benefit claims.

18. If the SIP Plan Administrator hired outside lawyers for review of divorce decrees, all costs for legal review conducted by outside legal counsel retained for that purpose would reduce plan benefits available to the plan participants.

19. Setting up systems for recording each divorce decree received somewhere within DuPont and ensuring the decree is forwarded to the appropriate plan administrator for each plan will require substantial revisions to existing processes. DuPont relies upon separate third party administrators to record beneficiary designation forms and process claims for plan benefits under the SIP, pension, and life insurance plans The systems of these third parties are not currently set up to track divorces with regard to DuPont – sponsored benefit plans. Thus, each of the systems utilized by these service providers would also have to be modified to provide for maintaining records of divorces, tracking legal assessment of the impact of divorce decrees on beneficiary designations, and similar issues which are not currently required. **I am familiar with the information tracked by**

the third party vendors that assist DuPont in administering the SIP because I am responsible for overseeing the systems used by those vendors to ensure that they meet SIP needs and for responding to problems involving use of those systems as they impact DuPont. I have access to the data tracked by those vendors, identified below, as a part of my ongoing job responsibilities, so I am aware of the information tracked for DuPont's use. Furthermore, I was responsible for designing the methods used by the third party vendors for tracking data for SIP participants and beneficiaries. The third party vendor which was responsible for maintaining current records of beneficiary designations for the period encompassing 2001, 2002, and 2003 was Mellon Financial Services. The third party vendor responsible for making payments of SIP benefits and maintaining records of those payments in 2001, 2002, 2003, and 2004 has been Merrill Lynch. I am personally aware that DuPont has relied on these third parties to maintain the databases I have described because I consult these records in my oversight and coordinator role. Neither of those vendors has tracked "divorced" status for the SIP or the DuPont Pension Plan; rather they have noted in the databases only whether a participant is "single" or "married" at the current time. Marital

history is not tracked (*e.g.*, prior divorces or prior marriages). There has been no tracking of the content of divorce decrees or divorce property settlements by either Mellon Financial Services or Merrill Lynch.

20. Plaintiff initially demanded that the SIP benefits be paid to the Kennedy estate based on Texas Family Code Section 9.302. *See,* Exhibit No. 1 to this affidavit, a true and correct copy of the April 26, 2001 letter from Kari Ellen Kennedy Duckworth to DuPont Connection. **Upon its receipt, Exhibit No.1 was maintained as a record of DuPont with regard to the SIP account of William Patrick Kennedy. It was within the regular course of business of DuPont to maintain a copy of this letter with other DuPont records relating to Mr. Kennedy's SIP account at the time the letter was received from its sender, Kari Ellen Kennedy Duckworth.**

21. I am over the age of 18, am of sound mind, have never been convicted of any felonies or crimes of moral turpitude, and am competent to provide this affidavit. I have provided this affidavit voluntarily and I have had the opportunity to make all changes that I chose to make to its content before signing it.

FURTHER AFFIANT SAYETH NOT.

/s/ Mary D. Dineen
MARY D. DINEEN

SUBSCRIBED AND SWORN to before me, the undersigned authority on this the 10th day of June, 2004.

/s/ Nancy Ann Miller
NOTARY PUBLIC, IN AND FOR
THE STATE OF DELAWARE

NANCY ANN MILLER
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires
Aug. 16, 2006

EXHIBIT 1

April 26, 2001

DuPont Connection
930 North Riverview Drive,
Suite 800
Totowa, New Jersey 07512
Attention: Kim Brazinski

Overnight Mail
Fax No. (919) 854-6402

RE: No. 7573 – Estate of William Patrick Kennedy, Deceased, County Court of Tyler County, Texas
Social Security Number: XXX-XX-XXXX

To Whom It May Concern:

By prior correspondence, you were informed of the death of my father, William Patrick Kennedy, on March 27, 2001.

On April 16, 2001, I qualified as Independent Executrix of this Estate and I am enclosing current Letters Testamentary for your file. Also, I am enclosing a copy of my father's Will.

One (1) of the assets of my father's estate was an investment through the DuPont Savings and Investment Plan established in October, 1973. I am enclosing a copy of the investment account as of December 31, 2000. At the time this investment was created, my father was married to my mother, Liv Kennedy, and I understand my mother was designated beneficiary under this plan at the time it was created in 1973. Also, I understand that there is no named alternative beneficiary.

For your information, my father and mother were divorced on May 6, 1994 and I am enclosing a copy of their divorce decree. Also, I am enclosing a copy of Sec. 9.302 of the Texas Family Code.

In my conversation with a representative of your company, it is my understanding you intend to pay the proceeds under the above mentioned plan to my mother, Liv Kennedy. I have found no evidence to indicate the designating provision in the plan in favor of my mother is effective because:

(1) the divorce decree does not designate my mother as the beneficiary;

(2) my father did not redesignate my mother as the beneficiary after rendition of the decree on May 6, 1994; or

(3) my mother is not designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or dependent of either my father or mother.

In my opinion, the designation of my mother as beneficiary under the above mentioned plan is not effective under subsection (a) of Sec. 9.302, Texas Family Code and, since there is no named alternative beneficiary, a request is hereby made for the proceeds under the above mentioned plan be distributed to the Estate of William Patrick Kennedy.

The attorney for the Estate and I will be agreeable to discuss this matter to determine whether or not you are in agreement with this request for distribution to my father's estate of the plan proceeds. You

can direct any inquiry regarding this matter to the Estate attorney, James M. Allison, 300 West Bluff Street, Woodville, Texas 75979, (409) 283-2532.

Sincerely,

/s/ Kari Ellen Kennedy Duckworth
Kari Ellen Kennedy Duckworth
Independent Executrix of the
Estate of William Patrick Kennedy,
Deceased

(w/enclosures)

Enclosures
cc: Merrill Lynch
265 Davidson Avenue, 4th Floor
Somerset, New Jersey 08873
Attention: Legal Department

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, Deceased, ***Plaintiff,***	§	
v.	§	**CIVIL ACTION NO. 1:01-CV-904**
E.I. DUPONT DE NEMOURS AND COMPANY AND PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, ***Defendant.***	§	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

(Filed March 3, 2005)

Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, the Local Rules of The United States District Court for the Eastern District of Texas, Appendix B, and order of the District Court, this matter is before the undersigned United States Magistrate Judge[1] at Beaumont, Texas, for all proceedings

[1] This civil action was previously assigned to the Honorable Wendell C. Radford. Effective October 1, 2004, Judge Radford

(Continued on following page)

and entry of judgment in accordance with the consent of the parties. The following motions are pending before the Court:

– *Defendants' Motion for Summary Judgment* [Clerk's doc. #40] filed by E.I. du Pont de Nemours and Company ("DuPont") and Plan Administrator for DuPont Savings and Investment Plan ("Plan Administrator [sic]");

– *Plaintiff's Motion for Summary Judgment,* filed by Kari Ellen Kennedy [Clerk's doc. #41]; and

– *Third Party Plaintiffs' Alternative motion for Summary Judgment Against Third Party Defendant* asserted by DuPont and Plan Administrator [Clerk's doc. #39].

A. Background

i. Facts

According to the pleadings, motions and the agreed *Stipulation of Facts* [Clerk's doc. #33] filed by the parties, the Court summarizes the material background facts as follows. William Patrick Kennedy was an employee of DuPont and participated in DuPont's Savings and Investment Plan ("SIP"). While an employee of DuPont, on June 30, 1971, Mr. Kennedy married Liv Kennedy. On December 6, 1974, Mr.

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retired and his docket was reassigned to the undersigned United States Magistrate Judge.

Kennedy signed a written designation form identifying Liv Kennedy as his sole beneficiary under the SIP. Additionally, Mr. Kennedy signed a beneficiary designation form for his DuPont Tax Reform Act Stock Ownership Plan ("TRASOP") on July 21, 1980, also designating Liv Kennedy as the sole beneficiary. According to the parties, the SIP and TRASOP merged prior to Mr. Kennedy's death and are referred to, collectively, as the SIP. The Kennedys divorced on June 2, 1994, in Jasper County, Texas, which is evidenced by a *Final Decree of Divorce. See Exhibit 1 to Stipulation of Facts.* On June 30, 1998, Mr. Kennedy retired from DuPont. He passed away March 27, 2001.

On April 16, 2001, Kari Ellen Kennedy Duckworth ("Kari Duckworth") qualified as Independent Executrix of her father's estate. On April 26, 2001, she demanded by letter that the DuPont plan pay the SIP benefits to Mr. Kennedy's estate. Said demand was rejected. The plan administrator paid the benefits of the SIP to Liv Kennedy as the beneficiary designated by Mr. Kennedy. The benefits were paid to Ms. Kennedy in an amount totaling $414,143.22. *See Third Party Plaintiff's Alternative Motion for Summary Judgment Against Third Party Defendant.*

ii. Issues

In her motion, Plaintiff Kari Duckworth requests that DuPont pay the value of the decedent's SIP to her as executrix of her father's estate. She argues

that Liv Kennedy waived her interest in the SIP in her divorce decree, and therefore, the interest belongs to Plaintiff Duckworth under common law. Alternatively, Defendant DuPont contends that it did not wrongly pay the SIP proceeds to Liv Kennedy. DuPont relies on federal law preemption, arguing that as a matter of law ERISA preempts the language contained within the state divorce decree and overrides the waiver argument. Therefore, the undersigned must analyze which argument prevails legally to determine the proper recipient of the SIP interest.

Additionally, DuPont and the Plan Administrator filed their *Amended Third Party Complaint* against Liv Kennedy based upon theories of unjust enrichment and the provisions of the SIP plan [Clerk's doc. #37]. DuPont specifically seeks this relief in the event that it does not prevail on its Motion for Summary Judgment and the Court finds that the benefits were wrongly paid to Liv Kennedy. This request for recovery of the funds paid to Ms. Kennedy is the basis for DuPont's *Alternative Motion for Summary Judgment Against Third Party Plaintiff* the merits of which the Court need not reach until the ultimate issue of the proper SIP recipient is determined.

B. Discussion

General Summary Judgment Standard of Review

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). This rule places the initial burden on the moving party to identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548 (1986) (Quoting Rule 56(c)); *Stults v. Conoco, Inc.,* 76 F.3d 651, 655-56 (5th Cir. 1996) (Citations omitted). The movant's burden is only to point out the absence of evidence supporting the non-movant's case. *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 913 (5th Cir. 1992). When the moving party has carried its burden of demonstrating the absence of a genuine issue of material fact, the non-moving party bears the burden of coming forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). In considering a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2505 (1986).

The parties agree that no genuine issue of material fact exists in this case other than the voluntariness of any waiver by Ms. Kennedy, if that issue becomes relevant. The *Stipulated Facts* establish the parties' agreement that the key issues are legal, not factual, in nature. Accordingly, the resolution of this proceeding is to be decided as a matter of law, based

on the legal arguments presented in the pending motions now before the Court.

Review of the ERISA Plan Administrator's Denial of the Estate's Claim

As noted above, the plan administrator distributed the proceeds of the SIP to Liv Kennedy instead of filing an interpleader action to determine to appropriate beneficiary. Therefore, the plan administrator's decision that must be reviewed under the appropriate standard of review. In *Firestone Tire and Rubber Co. V. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989), the Supreme Court held that when an administrator's denial of benefits is challenged, the decision is reviewed under a *de novo* standard unless the plan gives the administrator discretionary authority as to this decision. Dupont argues that, in this case, the plan provided the administrator with discretionary authority to interpret the plan, therefore this Court must evaluate the administrator's decision to pay Liv Kennedy under an abuse of discretion standard. At the same time, Dupont argues that the plan clearly required payment to the designated beneficiary and the administrator paid in accordance with the beneficiary designation.

In this case, the Court finds that Dupont's distribution of the benefits was not discretionary in nature. As Dupont itself contends, the administrator paid benefits under the requirements of the plan. Because there was no discretionary authority in the

administrator's decision, the denial of benefits to the estate is reviewed under a *de novo* standard. *See Brandon v. Travelers Insurance Company, et. al.*, 18 F.3d 1321, 1323-1324 (5th Cir. 1994), see also *Garland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1118 (10th Cir.) *Cert. Denied,* 502 U.S. 1020, 112 S.Ct. 670, 116 L.Ed.2d 761 (1991) (*de novo* standard applies when a plan compels the company to pay proceeds to the beneficiary of record).

ERISA Preemption and Waiver Issues

There is no dispute that the DuPont SIP is an ERISA[2] plan. ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Fifth Circuit held that the Texas beneficiary redesignation statute, Texas Family Code Section 9.301, relates to employee benefit plans and is preempted by ERISA. *Manning v. Hayes,* 212 F.3d 866, 870 (5th Cir. 2000). In *Manning,* the Fifth Circuit reaffirmed the rule set forth in *Clift v. Clift,* 210 F.3d 268 (5th Cir. 2000) and *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321 (5th Cir. 1994), that federal common law, rather than the text of ERISA itself, governs resolution of cases in which a former spouse who is still the designated beneficiary of a policy governed by ERISA is alleged to have waived her rights to the

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[2] Employment Retirement Income Security Act, Title 29 United States Code, Section 1001 *et seq.*

policy benefits. *Manning,* 212 F.3d at 872. The Fifth Circuit opted not to follow the minority view adopted by the Sixth Circuit[3], which employs the principles of conflict preemption, noting that "the law of family relations, which includes an individual's right to expressly apportion property upon divorce, has traditionally been a fairly sacrosanct enclave of state law." *Id.* at 872. The court determined that in applying federal common law, the courts should borrow from state law when determining the law that should control. *Id.*

According to the Fifth Circuit, the rule of federal common law applicable to disputes concerning waiver by a designated beneficiary of an ERISA plan is that "a named ERISA beneficiary may waive his or her entitlement to the proceeds of an ERISA plan providing life insurance benefits, provided that the waiver is explicit, voluntary, and made in good faith." *Id.* at 874.

Dupont questions whether this is still the law in the Fifth Circuit, given the U.S. Supreme Court's decision in *Egelhoff v. Egelhoff,* 532 U.S. 141, 149 L. Ed. 2d 264, 121 S. Ct. 1322 (2001). In *Egelhoff,* the Supreme Court held that ERISA preempted a Washington state statute providing for automatic

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[3] *See Manning*, at 871 (Citing *Metropolitan Life Ins. Co. v. Marsh,* 119 F.3d 415 (6th Cir. 1997); *Metropolitan Life Ins. Co. v. Pressley*, 82 F.3d 126 (6th Cir. 1996); *McMillan v. Parrott,* 913 F.2d 310 (6th Cir. 1990).

revocation of the designation of a former spouse upon divorce. *Egelhoff,* 532 U.S. at 143. The Court noted that preemption of such statutes is necessary to prevent "requiring ERISA administrators to master the relevant laws of 50 states." *Id.* at 149. However, the Court limited its holding to the finding that the Washington statute was expressly preempted by ERISA and declined to address whether the principles of conflict preemption applied. *Id.* at 146. The Court also failed to address the circuit split regarding whether federal common law or ERISA itself governs in cases of preemption and did not overrule the Fifth Circuits common law approach as set out in *Clift* and *Brandon.*

Accordingly, this court was left with the doubt cast by *Egelhoff* on the state of Fifth Circuit law regarding the divorced beneficiary/ERISA preemption issue. However, the undersigned derived much guidance from Judge Schell's detailed analysis in *Metropolitan Life Ins. Co. v. Palmer,* 238 F.Supp. 2d 821 (E.D. Tex. 2002).

First, as pointed out in *Metropolitan Life,* the *Egelhoff* case is distinguishable from *Brandon. Egelhoff* involved a state statute that affected the designation of beneficiaries, while *Brandon* involved a divorce decree that might constitute a waiver under federal common law. *Metropolitan Life,* at 825-26. Also, neither of the Fifth Circuit opinions discussing *Egelhoff* have clearly overridden *Brandon* nor adopted the *Egelhoff* holding in a case with facts similar to those before the Court in this case.

Also, in *Egelhoff*, the Supreme Court declined to address whether conflict preemption applies and did not overrule the federal common law approach set forth in *Brandon* and *Clift*. Absent a clear showing that the *Brandon* rule is no longer applicable or that it has been overruled by the Supreme Court, this court was not in a position to depart from the established law of the Fifth Circuit. *See Metropolitan Life*, at 826. (Quoting *Manning v. Hayes*, 212 F.3d 866, 872 (5th Cir. 2000)).

Any doubt left regarding this issue was resolved by the Fifth Circuit's recent ruling in *Guardian Life Insurance Company v. Finch*, 295 F.3d 238 (5th Cir. 2004). In *Finch*, the Fifth Circuit held that "*Egelhoff* does not undermine this court's longstanding approach of relying on federal common law to determine if an ERISA plan's beneficiary has effected a common law waiver." *Id.* at 242. The Fifth Circuit again recognized the federal common law rule of waiver, reemphasizing its "longstanding approach of relying on federal common law to determine if an ERISA plan's beneficiary has effected a common law waiver." *Id.* at 243. This Court therefore concludes that since no resolution of the case maybe reasonably drawn from the text of ERISA itself, we must look to federal common law. Accordingly, Plaintiff prevails on her argument.

Did Liv Kennedy voluntarily waive the SIP benefits in the divorce decree?

The Court now turns to the federal common law of waiver. As stated *supra,* In *Manning,* the Fifth Circuit reiterated the rule that any waiver of ERISA benefits must be explicit, voluntary, and made in good faith. 212 F.3d at 874. The *Final Decree of Divorce*[4], signed and executed by decedent, Liv Kennedy, and their respective attorneys, clearly states that Liv Kennedy is divested of all right, title, interest and claim in and to such property including "the proceeds therefrom, and any other rights related to any profit-sharing plan, savings plan, employee thrift plan, employee stock, ownership plan, retirement plan, pension plan, or like benefit program, existing by reason of Respondent's . . . employment, except for that portion awarded to Liv Kennedy, hereinabove." The portion reserved and awarded to Ms. Kennedy, as mentioned in the divorce decree, was addressed separately by a Qualified Domestic Relations Order and a Second Amended Qualified Domestic Relations Order: DuPont Pension and Retirement Plan, both filed in the District Court in Jasper County, Texas. *See Exhibit 5 to Plaintiff's Motion.* The amount awarded to her by the QDRO is not in dispute.

The Court must address the facts presented in Liv Kennedy's *Affidavit,* attached to her *Response to*

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[4] *See Exhibit 1 to Stipulation of Facts and Exhibit 4 to Plaintiff's Motion for Summary Judgment.*

Plaintiff's Motion for Summary Judgment and Third-Party Plaintiff's Alternative Motion for Summary Judgment. Ms. Kennedy claims that she "had no actual knowledge" that she was giving up her right as beneficiary of the SIP funds. She does not recall reading over the divorce decree, "opting instead to simply take the advice of my attorney." This language is problematic because, assuming Liv Kennedy's assertions are true, they directly controvert her knowing waiver set forth in the divorce decree. However, the Court finds that the facts presented by the affidavit do not create a genuine issue of fact as to the waiver presented in the divorce decree. The cases clearly establish that a divorce decree such as the one presented constitute a knowing and voluntary waiver as a matter of law. *See Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir. 1994). The Court is not in a position to second-guess Liv Kennedy's state of mind at the time she signed the decree. Although she makes conflicting statements in her affidavit, they are only asserted now that the SIP proceeds are the subject of litigation. The divorce decree stands on its own, and Liv Kennedy's intentions to waive her right to the SIP proceeds are corroborated by the QDROs, discussed *supra,* filed long after the period surrounding the execution of her divorce decree. For these reasons, the Court cannot give full credit to Ms. Kennedy's statements.

Liv Kennedy initiated the divorce, was represented by counsel, and executed the decree. The Court finds that the language contained within the

divorce decree is virtually identical to the language of the decree in *Brandon*. The decree clearly evidenced Ms. Kennedy's explicit, voluntary and good faith waiver of any rights to the proceeds of the SIP.

Additionally, this is not a case such as *Metropolitan Life* where the divorce decree is unsigned by the parties and entered as a court order, thus creating factual issues as to the voluntariness of the waiver. 238 F. Supp. 2d at 826. Instead, it is clear that Ms. Kennedy's waiver of the SIP proceeds was done under the advice of counsel and voluntarily. The parties have stipulated to its validity. The waiver is further supported by the entry of the Second Amended QDRO, expressly addressing the DuPont plan benefits. Applying the federal common law of waiver in this matter, it is clear that Ms. Kennedy waived her rights to the SIP benefits at issue.

Dupont argues that finding of waiver on Liv Kennedy's part would violate the anti-alienation provision of ERISA set forth in Title 29, United States Code, Section 1056(d)(1). Section 1056(d)(1) provides that each *pension plan* shall provide that benefits may not be assigned or alienated. 29 U.S.C. § 1056(d)(1) (emphasis added). Dupont correctly notes that *Manning, Clift,* and *Brandon* all involve insurance proceeds which are not subject to the anti-alienation provision. In addition, Dupont points out that a domestic relations order qualifying as a QDRO (which is a listed exception to the anti-alienation rule) was never submitted for the SIP, although one

was submitted for the another [sic] account not in controversy in this case.

In 1984, Congress passed the Retirement Equity Act ("REA"), which amended ERISA. The REA created the Qualified Domestic Relations Order "QDRO," which is a mechanism for recognizing the interest of the non-participant spouse in benefits under ERISA retirement plans. *See Dorn v. Int'l Bhd. of Elec. Workers,* 211 F.3d 938, 942 (5th Cir. 2000). The QDRO protects divorced spouses, who, as a result of the divorce, might not receive the benefits they otherwise would have had available during their retirement as a means of income. *Boggs v. Boggs,* 520 U.S. 833, 847, 117, S.Ct. 1754, 138 L.Ed.2d 45 (1997). Among other things, a QDRO must contain the name of the alternate payee and amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which such amount or percentage is to be determined. 29 U.S.C. § 1056(d)(3)(C).

In this case, the decedent had no reason to submit a QDRO to the SIP due to the fact that none of the proceeds of that account were subject to division in the divorce. This Court looks once again to the Fifth Circuit's decision in *Brandon* for guidance and determines that Liv Kennedy's voluntary waiver does not violate the anti-alienation provision of ERISA. In *Brandon,* the Fifth Circuit noted that the ERISA plan in question was a welfare plan and, therefore, was not subject to the anti-alienation provision of ERISA. *Brandon,* 18 F.3d at 1324. However, the Brandon court also stated that, even so, "[w]e have previously

held that a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an assignment made pursuant to a bona fide settlement of such a controversy is not invalidated by the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1)." *Id.* at 1324, n.4 (Citing *Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989). The Seventh Circuit also held that an ex-spouse's waiver does not violate the anti-alienation provision of ERISA. *See Fox Valley & Vicinity Constr. Workers' Pension Fund v. Brown,* 897 F.2d 275, 277-280 (7th Cir. 1990), *cert. denied,* 498 U.S. 820 (1990).

Accordingly, the benefits were wrongly paid to Ms. Kennedy and, as Executrix of the decedent's estate, Kari Kennedy Duckworth is entitled to the value of decedent's SIP at the time of his death, which, according to the *Stipulation of Facts,* was $402,152.56 on March 31, 2001 (four days after his death). Ms. Kennedy Duckworth prevails on her motion for summary judgment.

Alternative Motion Regarding Liv Kennedy's Reimbursement to DuPont

Having found that Ms. Kennedy waived her right to the SIP proceeds, the Court must analyze the Plan Administrator's request for reimbursement from Ms. Kennedy. The relevant provision is Section 502(a)(3) of ERISA, codified at 29 U.S.C. § 1132(a)(3). This section allows for "equitable relief," and DuPont

argues that it is entitled to restitution and recovery for unjust enrichment, specifically the recovery of the improper payment to Ms. Kennedy, as equitable relief.

Section 502(a)(3) arms plan administrators with a cause of action "to obtain . . . appropriate equitable relief" to redress any act in violation of ERISA or the terms of the plan. 29 U.S.C. § 1132(a)(3). The Supreme Court has interpreted the boundaries of "equitable relief" under Section 502(a)(3) as limiting a plaintiff's remedies to those that were traditionally considered equitable in nature. *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 210 (2002) (Quoting *Mertens v. Hewitt Associates,* 508 U.S. 248, 256 (1993)). The Court emphasized that Congress' use of the word "equitable" was not inadvertent, but rather was a deliberate act on its part to limit a Section 502(a)(3) plaintiff's remedies to those that were traditionally considered equitable in nature. *Id.* at 221. The Court noted that in cases in which the plaintiff could not assert title or right to a particular piece of property, but in which he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him, the plaintiff had a right to restitution at law through an action derived from the common-law writ of assumpsit. *Id.* at 213. In cases such as this, the plaintiff's claim was considered legal because he sought to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money. *Id.*

In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular finds or property in the defendant's possession. *Id.* However, if the property sought to be recovered or its proceeds have been so dissipated so that no product remains, the plaintiff's claim is only that of a general creditor, and the plaintiff cannot enforce a constructive trust of or an equitable lien upon the property of the defendant. *Id.* at 213-214. Thus, for an action in restitution to lie in equity, ordinarily in the form of a constructive trust or an equitable lien, an ERISA plaintiff must "seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

The Plan Administrator has submitted no summary judgment evidence establishing that the funds sought have been identified and traced to a particular account or property owned by Liv Kennedy. Indeed, it appears that the funds have been spent. *See Exhibit E to Liv Kennedy's* Response [Clerk's doc. #47]. Therefore, at this stage of the litigation, the Plan Administrator stands as a general creditor and, under *Knudson,* is not entitled to restitution.

The Plan Administrator next contends that it is entitled to restitution under the common law theory of unjust enrichment. The Fifth Circuit Court of Appeals has recently addressed this issue, interpreting *Knudson.* Specifically, the Fifth Circuit stated

that dicta in *Knudson* should not be viewed "as an invitation to the lower courts to grant plan fiduciaries a federal common law right to pursue claims for legal remedies against participants." *Coop. Benefit Adm'n, Inc. v. Ogden,* 367 F.3d 323, 332-33 (5th Cir. 2004). In *Ogden,* Judge Wiener noted that a plan fiduciary's failure to state a statutory cause of action under ERISA does not bar federal subject matter jurisdiction over its unjust enrichment claim under federal common law. *Id.* at 328. However, the ability of a plaintiff to state a federal common law cause of action depends on the existence of a "gap" in the text of ERISA that allows for the creation of the federal common law remedy sought by the plaintiff. *Id.* at 329. The *Ogden* court also stated that *Knudson* and *Mertens* demonstrate that Congress, in drafting Section 502(a)(3)(B) to allow only equitable relief, specifically contemplated the possibility of extending to plan fiduciaries the right to sue a participant for money damages and chose instead to limit fiduciaries' remedies to those typically available in equity. *Id.* at 331. Therefore, there is no "gap" in ERISA on this question and thus no basis for granting a common law remedy. *Id.* In conclusion, the Fifth Circuit refused to create a federal common law right of unjust enrichment that would allow a plan fiduciary to assert an action for legal relief against a participant, both parties being members of categories expressly identified in Section 502. *Id.* at 333.

This Court finds *Ogden* dispositive on the issue. ERISA is not silent on this matter. ERISA allows the

kind of equitable relief sought by the Plan Administrator only if the proceeds are clearly traced to particular funds or property in Liv Kennedy's possession. There has not been such a showing in this case. Therefore, this Court cannot create a federal common law right to the relief sought in this instance.

Also in *Ogden,* the Fifth Circuit distinguished its previous decision of *Jamail, Inc. v. Carpenters District Council of Houston Pension & Welfare Trusts,* 954 F.2d 299 (5th Cir. 1992), a case upon which DuPont relies heavily. *Jamail* is distinguishable from the facts in *Ogden,* and the facts in this case, because it involved an *employer's* common law right to recover contribution overpayments. *Ogden,* at 333 (emphasis added). In *Ogden,* the Fifth Circuit noted that ERISA Section 502 provides a private right cause of action for fiduciaries, participants, and beneficiaries, but not for employers and, therefore, reasoned that a "gap" existed in ERISA's text regarding an employer's rights to recover overpayment of contributions from the plan to which such overpayments had been made. *Id.* Thus, in *Jamail,* the Court held that recognition of a federal common law right of restitution for an employer vis-a-vis a plan was appropriate, as ERISA's text did not address the issue, and such a right would further ERISA's underlying purposes by encouraging small employers to sponsor benefit plans for their employers [sic]. *Id.*

In the case at bar, a private right of action for equitable relief is enumerated under Section 502(a). Therefore, there is no "gap" which would allow the

Court to "rewrite" ERISA and create a common law right.

Directed by *Ogden,* the undersigned cannot allow DuPont and the Plan Administrator to proceed with their claims for restitution and unjust enrichment. *Ogden* clearly decides against granting a federal common law right of unjust enrichment or restitution for a plan administrator under Section 502(a)(3). Additionally, DuPont has not established that its claims are equitable, rather than legal, in nature, as defined by *Knudson* and *Ogden.* The Court cannot differentiate the situation before it from the cases discussed herein. By attempting to recover funds from Ms. Kennedy, DuPont is seeking a legal remedy. To impose personal liability on a defendant for a contractual obligation to pay money is legal in nature and unauthorized by Section 502(a)(3). *See Knudson,* 534 U.S. at 210, 221. Although DuPont couches its claims in equitable terms, it continuously argues that it would be against the terms of the plan if Ms. Kennedy were not required to reimburse the proceeds. This clearly indicates a contractual liability as DuPont seeks to impose personal liability to pay money on Ms. Kennedy. *See id.* at 211. Further, there is no evidence that the proceeds are in Ms. Kennedy's possession or that they exist in the form of a constructive trust or an equitable lien. *See id.* at 213. None of the cases presented by DuPont establish that their claim is equitable in nature and therefore valid under ERISA. In fact, DuPont relies on cases which are either factually distinguishable or predate the

law as announced in *Knudson* and *Ogden*. Accordingly, the Court finds that DuPont's claim for restitution and unjust enrichment is legal, not equitable, in nature, and therefore, according to *Ogden* and *Knudson,* is not a claim that is available under Section 502(a)(3). The *Alternative Motion for Summary Judgment* should therefore be denied.

The State Law Breach of Contract Claims

In her pleadings, Plaintiff originally set forth a cause of action against DuPont for breach of contract. *See Amended Complaint* [Clerk's doc. #24]. DuPont has requested summary judgment on these state law contractual claims, arguing that they are preempted by ERISA. *See Defendants' Motion for Summary Judgment* [Clerk's doc. #40]. Having engaged in the analysis under ERISA and granted Plaintiff relief as a beneficiary, the undersigned agrees with DuPont that the state law claims are preempted. After a review of Plaintiff's responses, the parties seem to be in agreement on this issue. Accordingly, the Court will grant DuPont summary judgment on Plaintiff Kari Kennedy Duckworth's state law breach of contract claims.

C. Order of the Court

Fully incorporating the findings and legal conclusions set forth herein, the Court **ORDERS** as follows:

– *Plaintiff's Motion for Summary Judgment* [Clerk's doc. #41] is **GRANTED**; and Plaintiff is accordingly entitled to the value of decedent's benefits at the time of his death, $402,152.56;

– *Defendant's Motion for Summary Judgment* [Clerk's doc. #40] is **DENIED** in part and **GRANTED** in part, being granted with respect to Plaintiff's state law contractual claims; and

– the *Third Party Plaintiff's Alternative Motion for Summary Judgment against Third Party Defendant* [Clerk's doc. #39] is **DENIED**.

It is so ordered.

SIGNED this the 3rd day of March, 2005.

/s/ Keith F. Giblin
KEITH F. GIBLIN
UNITED STATES
MAGISTRATE JUDGE

[SEAL]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, Deceased,	§	**Civil Action Number 1:01-CV-904**
Plaintiff,	§	
v.	§	
E.I. DUPONT DE NEMOURS & CO., et al,	§	
Defendants.	§	

ORDER ON MOTIONS FOR JUDGMENT AS A MATTER OF LAW AND NEW TRIAL

(Filed Nov. 15, 2005)

Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, the Local Rules of The United States District Court for the Eastern District of Texas, Appendix B, and order of the District Court, this matter is before the undersigned United States Magistrate Judge, at Beaumont, Texas, for all proceedings and entry of judgment in accordance with the consent of the parties. Pending before the Court are *Defendants' Motion for Judgment as a Matter of Law and Alternative Motion for a New Trial* [Clerk's doc. #83, 84].

Having considered the motions, submissions of the parties, the record in this cause, and the applicable law, the Court determines that the motions should be denied. It is accordingly **ORDERED** that the *Defendants' Motion for Judgment as a Matter of Law and Alternative Motion for a New Trial* [Clerk's doc. #83, 84] are **DENIED**.

It is so ordered.

SIGNED this the 15th day of November, 2005.

/s/ Keith F. Giblin
KEITH F. GIBLIN
UNITED STATES
MAGISTRATE JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 19, 2008

Mr. Stacy L. Kelly
1925 Lexington
Houston, TX 70098

Re: Kari E. Kennedy, et al.
v. Plan Administrator for Dupont Savings and Investment Plan, et al.
No. 07-636

Dear Mr. Kelly:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted limited to Question three presented by the petition.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

91

(4)

No. 07-636

FILED
MAY 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

versus

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Kari Ellen Kennedy, Independent Executrix of the Estate of William Patrick Kennedy (the "Executrix").

Respondents: The Plan Administrator for DuPont Savings and Investment Plan and E. I. DuPont de Nemours & Company.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kari Ellen Kennedy is an individual who does not fall within the scope of Supreme Court Rule 29.6's disclosure requirement.

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OPINIONS BELOW

The Fifth Circuit's Opinion (Petition for *Certiorari* ("Petition") at APP. 1-14) is published at 497 F.3d 426. The district court's final judgment (Petition at APP. 15-18) and summary judgment (Petition at APP. 31-52) are unpublished.

JURISDICTION

The Fifth Circuit entered judgment on August 15, 2007. This Court has federal question jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act, 29 U.S.C §§ 1001 *et seq.* ("ERISA"); its Anti-Alienation Provision, 29 U.S.C. § 1056(d)(1), the Retirement Equity Act's ("REA's") "Qualified Domestic Relations Order" ("QDRO") amendment to ERISA, 29 U.S.C. § 1056(d)(3), ERISA's Fiduciary Duties Provision, 29 U.S.C. § 1104; and ERISA's Civil Enforcement Provision, 29 U.S.C § 1132, are the statutes subject to this appeal.

STATEMENT OF THE CASE

This is an estate's appeal of an ERISA decision about the enforceability of an ex-spouse's knowing,

voluntary, express, arms' length, court-approved divorce decree waiver of the right to receive benefits earned by a pension plan participant.

A. William Kennedy's employment at DuPont and marriage to Liv Kennedy.

On June 30, 1971, the late William Patrick Kennedy ("William Kennedy"), an employee of DuPont de Nemours & Company ("DuPont"), married the late Liv Kennedy, who later divorced him ("ex-wife Kennedy"). Petition at APP. 32.

While married, William Kennedy signed a beneficiary designation form on December 6, 1974 and on July 21, 1980 that identified Liv Kennedy, his then-wife, as the sole beneficiary of his DuPont Savings and Investment Plan ("SIP"). *Id.* at 32-33. The SIP, an employee pension benefit plan under 29 U.S.C. § 1002(2), stated that federal law required him to name his spouse unless his spouse consented to another beneficiary or she could not be located. JOINT APPENDIX at 43. William Kennedy named no other SIP beneficiaries. Petition at APP. 32.

B. Ex-wife Kennedy's divorce decree waiver of her right to receive ex-husband William Kennedy's SIP benefits.

Ex-wife Kennedy, a divorce-court petitioner, sued her husband William Kennedy, in a state court in Jasper, Texas. Petition at APP. 33. That proceeding resulted in a Final Decree of Divorce. Petition at APP.

33 and 75. The opposing attorneys presented an arms' length property division agreement to District Court Judge Monte D. Lawlis. *Id.* at APP. 60 and 75. On June 3, 1994, after accepting the parties' waiver of a jury trial, Judge Lawlis found that the parties' settlement was "a just and right division of the parties' marital estate, having due regard for the rights of each party . . . " *Id.* at APP. 60-62 and 75. Two parts of the decree divided William Kennedy's DuPont benefits. The first part reads:

> IT IS ORDERED AND DECREED that the estate of the parties is divided as follows:
>
> Petitioner [Liv Kennedy] is awarded the following as Petitioner's sole and separate property and Respondent is divested of all right, title, interest, and claim in and to such property:
>
> * * *
>
> 3. A portion of Respondent's [William Kennedy's] retirement benefits with E. I. DuPont de Nemours & Co., pursuant to the Qualified Domestic Relations Order which is attached hereto and incorporated by reference herein.

Id. at APP. 62. A QDRO, amended by court order on December 3, 1997, spelled out ex-wife Kennedy's receipt of William's retirement benefits. *Id.* at APP. 41-45 and 55-59. She also received the couple's Merrill-Lynch account; a 1983 Mercedes Benz; furniture; cash and jewelry; her pension, retirement, and

thrift plans; securities; and insurance policies. *Id.* at APP. 64-65. The Kennedys sold their two-tract, 121.35 acre home in Jasper; ex-wife Kennedy received the first $24,500 and half of the net sales proceeds. *Id.* at APP. 70-72.

In the decree's second part, ex-wife Kennedy voluntarily waived her right to receive benefits from her ex-husband's pension plan. Petition at APP. 2, 497 F.3d at 427-28. Her renunciation reads: "Respondent [William Kennedy] is awarded the following as Respondent's sole and separate Property, and Petitioner [Ex-wife Liv Kennedy] is hereby divested of all right, title, interest and claim in and to such property . . . 1. The entire 401k plan with Respondent's [William Kennedy's] employer, DuPont de DeNemours." Petition at APP. 64.

The Kennedy QDRO disbursed *part* of William's non-SIP benefits, a distribution not disputed here. Petition at APP. 41-45. After ex-wife Kennedy waived her right to receive William Kennedy's SIP benefits, the Kennedys did not sign a separate QDRO to govern the future disposition of SIP benefits. *Id.*

Four days after the divorce, on June 7, 1994, William Kennedy designated his only child, Kari Kennedy, as his only beneficiary on a DuPont beneficiary designation form. Its title was "COMPANY PAID SURVIVOR BENEFITS (PRE-RETIREMENT) SECTION XVI OF THE PENSION AND RETIREMENT PLAN." JOINT APPENDIX at 62.

C. William Kennedy retired from DuPont in 1998 and died in 2001 without changing his 1974 beneficiary designation of ex-wife Kennedy in his DuPont pension plan.

William Kennedy retired from DuPont in 1998. JOINT APPENDIX at 27. He died on March 27, 2001, *id.*, seven years after his divorce and twenty-seven years after executing the SIP naming his then-wife as sole beneficiary. *Id.* He died without replacing ex-wife Kennedy as his SIP beneficiary. *Id.* at 28. On March 27, 2001, DuPont's SIP contained no provisions addressing waivers, disclaimers, or a divorcing spouse's voluntary renunciation of pension benefits. *Id.* at 46-54.

DuPont's SIP stated that, "[i]f you die before receiving your SIP account balances, your designated beneficiary(ies) will receive the balance in your accounts." *Id.* at 43. "If you have no surviving spouse and no beneficiary has been named, distribution is made to your estate." *Id.* at 19. It noted that, "[i]f, in the opinion of the Company, there is a question as to the legal right of any beneficiary to receive a distribution under the Plan, the amount in question may be paid to the decedent's estate, in which event the Trustee and the Company shall have no further liability to anyone with respect to such amounts." *Id.* at 49.

The SIP's "Nonassignment" provision reads: "Except as provided by Section 401(a)(13) of the Code, no assignment of the rights or interests of account

holders under this Plan will be permitted or recognized, nor shall such rights or interests be subject to attachment or other legal processes for debts." *Id.* at 50-51. The SIP does not specify whether non-participant, divorced ex-spouses are "account holders" barred from making assignments.

D. The Estate sued to recover $402,000 in pension benefits DuPont paid to ex-wife Kennedy without filing an interpleader action to determine ownership of those proceeds.

A state court appointed Kari Kennedy, the daughter of William and ex-wife Liv Kennedy, Executrix of William Kennedy's Estate (the "Estate"). Petition at APP. 3. The Estate demanded that the SIP funds be distributed the Estate and pointed out that ex-wife Kennedy had waived her right to receive benefits. Petition at APP. 3-4; JOINT APPENDIX at 78-80. DuPont refused to pay the Estate, relying on the SIP beneficiary-designation. *Id.* at 4. The Estate requested ex-wife Kennedy to relinquish her SIP interest, but she refused, and DuPont paid her the SIP balance of some $402,000. *Id.* at 3.

In a July 31, 2001 letter to the Estate's attorney, DuPont Senior Legal Assistant Alan Beattie, a paralegal, wrote, "Your recent correspondence date [sic] June 19, 2001 to DuPont Corporation was forwarded to me for review." Dkt. 77 at 18. DuPont's paralegal did not state that anyone else had reviewed the

Estate's claim. *Id.* The paralegal sent a copy of his letter to DuPont attorney M. J. Anderson, but no affidavit establishes that Anderson read it (Lori Knauer was the only attorney authorized to address ERISA/SIP issues). JOINT APPENDIX at 65 and 73. No DuPont witness testified that any attorney supervised Mr. Beattie's denial of the Estate's claim.[1]

In its Motion for Summary Judgment, DuPont cited the Estate's April 26, 2001 notice-letter to DuPont and stated, in passive tense, that the claim "was rejected." Dkt. 40-1 at 5. The Estate did not receive William Kennedy's SIP proceeds, but nevertheless had to pay estate taxes on them. Dkt. 41 at 11-13. The Estate had a total value of $1,038,751. In 2001, the exemption for estates was $675,000. *Id.* If the SIP had not been in the Estate, its taxable value would have been $643,496, so the Estate would have

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[1] Plan Administrator Mary Dineen's affidavits establish that benefits attorney M. J. Anderson played no role in reviewing the Estate's claim. Ms. Dineen was responsible for oversight of the SIP, so she knew which attorney handled pension claims. JOINT APPENDIX at 65. Although she was "responsible for ensuring that questions relating to SIP provision interpretation are answered . . . ," she "look[ed] to DuPont's Legal Department for that legal interpretation." *Id.* at 73. "For the entire DuPont company, there is only one attorney who is currently dedicated to handling SIP benefit and investment issues. . . . *DuPont attorney Lori Knauer . . . the attorney . . . dedicated to addressing benefit issues, including benefit payment questions, arising under the SIP.* This is the practice I have actually followed for the six years [1998-2004] I have served. . . ." *Id.* at 16 ¶ 15 (emphasis supplied).

owed no taxes. *Id.* On December 26, 2001, the Executrix paid $105,768 in estate taxes to the U.S. Treasury and another $35,370 to Texas. JOINT APPENDIX at 29-31 and 37-42.

The Estate sued DuPont under 29 U.S.C. § 1132(a)(1)(B), alleging that DuPont misdirected SIP benefits by paying them to ex-wife Kennedy. Petition at APP. 33-34. DuPont sued ex-wife Kennedy, demanded the return of SIP benefits, and settled after it became clear that ex-wife Kennedy had spent the money. Petition at APP. 34, and 47; JOINT APPENDIX at 59. Ex-wife Kennedy died on July 7, 2007 in Norway, but her death does not resolve the issues on appeal.

The district court concluded that ex-wife Kennedy's voluntary waiver was enforceable, *citing Manning v. Hayes,* 212 F.3d 866, 872 (5th Cir. 2000), *cert. denied,* 532 U.S. 941 (2001):

> As stated, *supra,* in *Manning*, the Fifth Circuit reiterated the rule that any waiver of ERISA must be explicit, voluntary, and made in good faith. 212 F.3d at 874. The Final Decree of Divorce, signed and executed by William, Liv Kennedy, and their respective attorneys, clearly states that Liv Kennedy is divested of all right, title, interest and claim in and to such property including "the proceeds therefrom, and any other rights related to any profit-sharing plan, savings plan, employee thrift plan, employee stock, ownership plan, retirement plan, pension plan, or like

> benefit program, existing by reason of Respondent's [William Kennedy's] . . . employment, except for the portion awarded to Liv Kennedy, hereinabove." The portion reserved and awarded to Ms. Kennedy, as mentioned in the divorce decree, was addressed separately by a Qualified Domestic Relations Order . . . filed in the District Court in Jasper County. . . .

Petition at APP. 41. The court analyzed ERISA's QDRO provision and all relevant precedent.[2]

"Applying the federal common law of waiver in this matter," the district court ruled, "it is clear that Ms. Kennedy waived her rights to the SIP benefits at issue." *Id.* at APP. 42-43, *citing Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995). "In this case, William had no reason to submit a QDRO to the SIP due to the fact that none of the proceeds of that account were subject to division in the divorce." Petition at APP. 44. The district court awarded the Estate

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[2] *Boggs v. Boggs*, 520 U.S. 833 (1997); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Guardian Life Ins. Co. of Am. v. Finch*, 395 F.3d 238 (5th Cir. 2004), *cert. denied sub nom. Finch v. Galaway*, 544 U.S. 1056 (2005); *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Clift v. Clift*, 210 F.3d 268 (5th Cir. 2000); *Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989); *Fox Valley & Vicinity Construction Workers' Pension Fund v. Brown*, 897 F.2d 275 (7th Cir.) (*en banc*), *cert. denied*, 498 U.S. 820 (1990); and *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114 (10th Cir.), *cert. denied*, 502 U.S. 1020 (1991).

$402,152.56, an amount equal to the SIP funds DuPont paid to ex-wife Kennedy. *Id.* at 45. The district court declined to award any attorney's fees to the Estate.

E. The Fifth Circuit reversed the district court's award to the Estate.

On appeal, DuPont argued that a QDRO is the only method of changing beneficiaries after a divorce and that a plan document determines entitlement to ERISA benefits. Appellants' Brief, at 23-35. The Estate argued that the anti-alienation provision does not apply to a voluntary waiver of rights enforceable under federal common law.[3]

On August 15, 2007, the Fifth Circuit reversed the judgment awarding the Estate the value of William Kennedy's SIP funds. Petition at APP. 5-10. It held that the absence of a QDRO precluded enforcement of her divorce decree waiver, and ruled that, "[i]n the marital-dissolution context, the QDRO provisions supply the *sole* exception to the

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[3] The Estate cited 29 U.S.C. § 1055(c)(1)(A)(i) (spousal waivers of interest in joint and survivor benefits), *Fox Valley*; *Estate of Altobelli v. IBM*, 77 F.3d 78, 81 (4th Cir. 1996); *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003). The Estate averred that a beneficiary can disclaim benefits without a QDRO. *Id.* at 16-17, *citing Altobelli*, 77 F.3d at 81; *Rhoades v. Casey*, 196 F.3d 592, 598-99 (5th Cir. 1999), *rhg. & rhg. en banc denied*, 209 F.3d 721 (5th Cir.), *cert. denied*, 531 U.S. 924 (2000); *Manning*, 212 F.3d at 872-73; and *Guardian Life*, 395 F.3d at 240. *See* Appellee's Brief at 7-27.

anti-alienation provision; they exempt a state domestic-relations order determined to be a QDRO, under the standards set forth in ERISA." Petition at APP. 9-10. The Fifth Circuit affirmed the denial of attorney's fees to the Estate. *Id.* at 11-14.

SUMMARY OF ARGUMENT

This Court should reverse the Fifth Circuit's decision to invalidate ex-wife Kennedy's knowing, voluntary, and express, court-approved, divorce decree waiver of benefits. When Congress enacted ERISA, it authorized federal common law jurisprudence. Before and after enactment of ERISA, courts enforced voluntary waivers. ERISA did not prohibit waivers that had long been enforceable under common law. Waivers are *not* ERISA-barred assignments or alienations, so ERISA's anti-alienation and QDRO provisions do not apply to or bar them. This Court's *Egelhoff* and *Boggs* decisions do not govern voluntary, private waivers under federal common law. The "Federal Common Law" courts properly recognize the validity of a divorcing spouse's voluntary waiver of pension benefits.

Given her use of a QDRO to obtain part of her ex-husband's DuPont benefits, and her voluntary, arms' length, court-approved, divorce decree waiver of any right to receive his pension benefits, ex-wife Kennedy's renunciation of proceeds does not violate ERISA. A renunciation in favor of an ERISA participant does not defeat Congress' anti-spendthrift goals

in prohibiting alienations and assignments. A QDRO is *a* safe-harbor, but not the only harbor, available to spouses dividing marital property.

The Fifth Circuit's opinion dashes to bits the reasonable expectations of divorcees and heirs by invalidating attorney-negotiated, court-approved settlements divorcing spouses entered in reliance on a majority of federal appellate courts and the highest state courts in Michigan, Nebraska, New York, and Texas. Affirmation would encourage vengeful and greedy ex-spouses to disavow waivers. It would reduce the power of courts to respect state court judgments, and even keep them from enforcing common law "slayer" restrictions and modern "slayer" statutes. Affirmation would undermine ERISA's purposes by rewarding injustice and inequity.

ARGUMENT

I. When Congress enacted ERISA's Qualified Domestic Relations Order provision, it did not bar divorcing spouses from using voluntary court-approved waivers of pension benefits.

A. Congress declared that ERISA "shall supersede any and all State laws" to enact a federal common law of employee benefits.

ERISA created a federal common law of employee benefits. *Firestone Tire and Rubber Co. v. Bruch*, 489

U.S. 101, 110 (1989). *Cf. Burks v. Lasker,* 441 U.S. 471, 476-77 (1979). In reviewing waivers of federal rights, this Court applies traditional common law principles. In *Newton v. Rumery,* 480 U.S. 386 (1987), this Court articulated the standard of review:

> The question whether the policies underlying that statute may in some circumstances render that waiver unenforceable is a question of federal law. We resolve this question by reference to traditional common-law principles. . . . [This] principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.

Id. at 393 (*citing* RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981)). In *Newton,* this Court enforced a waiver of federal rights under the Civil Rights Act. *Id.* at 397-98. "[W]e conclude[d] that this agreement was voluntary . . . and that enforcement of this agreement would not adversely affect the relevant public interests." *Id.* The same rationale applies here.

This appeal involves a denial of ERISA benefits, statutory interpretation, and a summary judgment, so a *de novo* standard of review governs. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *Firestone,* 489 U.S. at 114-116; *Guardian Life,* 395 F.3d at 240.

B. Courts enforced voluntary waivers of rights under federal common law prior to Congress' enactment of ERISA and its later QDRO amendment.

Waiver is as much a part of federal common law as the thunder of fireworks above the National Mall is a part of a Fourth of July in Washington, D.C. Waiver has formed a major part of federal procedural rules for decades. *See* FED. R. CIV. P. 4(d); 8(c); 12(a)(1)(A)(2); 12(b); 12(h); 32(d); 35(b)(4); and 38(d); SUP. CT. R. 15.5, 17.5, 18.7 and 43.5. Before and after ERISA's enactment in 1974, federal courts have routinely decided cases involving federal waivers. In *Brown v. Routzahn*, 63 F.2d 914, 917 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), for example, the Sixth Circuit held that a recipient's waiver of the right to receive an inheritance was valid and was not a transfer of property under federal tax law. *See also Patton v. United States*, 281 U.S. 276, 311 (1930) (waiver of the right to a 12-person jury); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("[A] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."); *Brady v. United States*, 397 U.S. 742, 749 (1970) (discussing the "voluntariness" of a guilty plea); *Schneckcloth v. Bustamonte*, 412 U.S. 218, 224 (1973) (waiver of trial rights).

Congress intended to develop federal common law jurisprudence, not supersede it, when it enacted ERISA. In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), a case

about ERISA's "virtually unique pre-emption provision," *id* at 24 n. 26, this Court quoted Jacob Javits' prescient predictions about ERISA: "A body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans . . . ," *id.*, *quoting* 120 Cong. Rec. 29942 (1974)).

C. ERISA's federal preemption does not preclude divorcing spouses from signing court-approved voluntary waivers of pension benefits enforceable under federal common law.

The ERISA preemption statute, 29 U.S.C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." But it says nothing about superseding federal common law. Section 514(d) of ERISA, 29 U.S.C. § 1144(d), states that, "Nothing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under such law." ERISA's civil remedies provision, 29 U.S.C. § 1132(a)(3), authorizes a beneficiary (the Estate) to obtain, *inter alia*, "appropriate equitable relief" for ERISA violations. Petition at APP. 95.

Egelhoff and *Boggs* do not support DuPont's refusal to recognize waivers. In *Egelhoff*, this Court struck down a Washington statute that automatically

revoked every beneficiary-designation upon divorce. *Egelhoff,* 532 U.S. at 144; *Guardian Life,* at 141. That law "bound plan administrators to a particular choice of rules for determining beneficiary status. . . ." and "interfered with a nationally uniform plan administration." *Id.* at 148. "Uniformity is impossible . . . if plans are subject to different legal obligations in different states." *Id.* at 148-49. "*Egelhoff* only addresses whether ERISA pre-empts a state statute that automatically revokes the designation of a spouse as the beneficiary of a life insurance policy upon divorce," the Fifth Circuit ruled in *Guardian Life,* 395 F.3d at 242, and it looked to federal common law. *Id.* at 243. *See also Varity Corp. v. Howe,* 516 U.S. 489, 498, 509 (1996).

In contrast to *Egelhoff,* this case does not involve one of fifty different statutes. In *Boggs,* this Court "considered whether [ERISA] pre-empts a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits." 520 U.S. 833, 835-36 (1997). A Louisiana *statute,* not federal common law, authorized a divorcing spouse to assign her ex-spouse's benefits. *Rhoades,* 196 F.3d at 599 (*citing Boggs,* 520 U.S. at 844). This Court could "begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects," and hold "that there is a conflict, which suffices to resolve the case." *Boggs* at 841. The participant's first ex-wife transferred her interest in her ex-husband's pension benefits to their children.

Boggs, 520 U.S. at 837. The spouse "has not waived her right to the survivor's annuity." 520 U.S. at 842 and 844. *See also Rhoades*, 196 F.3d at 600. *Boggs* means only that state statutes run afoul of ERISA uniformity.

Factually, *Boggs* does not apply here, either. Ex-wife Kennedy made a knowing, voluntary, and express waiver of benefits – *and* a partial division of benefits through a QDRO. Petition at APP. 62. The ex-spouse disclaimed benefits; she did not assign them.

D. ERISA's "spendthrift" prohibition of alienations and assignments does not limit waivers enforceable under federal common law.

ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), states that, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." That spendthrift statute bars only assignments and alienations of benefits. It does not bar, limit, or reference waivers of pension benefits enforceable under federal common law.

ERISA does not define the terms "alienate" and "assign," so courts do so. *State Treasurer v. Abbott*, 468 Mich. 143, 149, 660 N.W.2d 714, 718 (2003), *cert. denied*, 540 U.S. 1112 (2004). The plain meaning of the terms "alienation" and "assignment" differ from the plain meaning of the word "waiver." Those concepts are distinctly different. An "alienation" is a "conveyance or transfer of property to another." *See*,

e.g., Bryan A. Garner (ed.), BLACK'S LAW DICTIONARY at 80 (8th ed. 2004) (giving as an example "alienation of one's estate"). Circuit Judge Fuentes referred to this "conveyance or transfer of property to another" definition of alienation in the 1999, seventh edition of BLACK'S in his dissenting opinion in *McGowan v. NJR Service Corporation*, 423 F.3d 241, 256 (3d Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1118, 166 L. Ed. 2d 906 (2007), where he explained how the Third Circuit erred in invalidating an ex-spouse's divorce decree waiver under ERISA.

An "assignment" is "the transfer of rights or property." Garner, BLACK LAW DICTIONARY at 128 (Oxford Univ. Press 8th ed. 2004), *citing inter alia*, Alexander M. Burrill, A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS § 1, at 1 (James Avery Webb 6th ed. 1894); *McGowan*, 423 F.3d at 256 (Fuentes, J., dissenting). In *Abbott*, 660 N.W.2d at 719, an ERISA pension case, the Michigan Supreme Court noted that, "The American Law Institute has defined 'assignment of a right' in THE RESTATEMENT OF CONTRACTS, p. 171, § 149(1) [(AM. L. INST. 1932)], as '[a] manifestation to *another person* by the owner of the right indicating his intention to *transfer*, without further action or manifestation of intention, *the right to such other person or a third person.*") (emphasis in original). These dictionary definitions and others led the Michigan Supreme Court to conclude that, "[a] property interest is assigned or alienated when it is

transferred to *another person.*" *Abbott,* 660 N.W.2d at 719 n. 8 (emphasis in original).

In contrast, a "waiver" does not transfer property from one person to another. It is defined as "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage." *McGowan,* 423 F.3d at 256 (Fuentes, J., dissenting), *citing* BLACK'S LAW DICTIONARY at 1574 (7th ed. 1999). *See also* BLACK'S at 1611 (8th ed. 2004) (defining waiver as "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage."). As Circuit Judge Fuentes noted in his *McGowan* dissent, "[w]aiver does not involve a transfer of rights; it is merely a relinquishment. Congress understands this distinction between a waiver and an assignment, *see* 5 U.S.C. § 8465, and chose only to prohibit the latter (along with alienations) in the anti-alienation provision of ERISA." *McGowan,* 423 F.3d at 256 (Fuentes, J., dissenting).

Long before ERISA existed, common law courts held that waivers of rights were not alienations, assignments, or transfers. At common law, a beneficiary under a will or trust was under no obligation to accept a legacy provided for him by the testator. *See generally* Lawrence Newman and Albert Kalter, *The Need for Disclaimer Legislation – An Analysis of the Background and Current Law,* 28 TAX LAWYER 571 (1975). That common law trust tradition is important because Congress invoked the law of trust in creating ERISA. *See Varity Corporation*, 516 U.S. at 496-97, *citing* H.R. Rep. No. 93-533 at 3-5, 11-13 (1973), 2

Legislative History of ERISA. Detailed disclaimer rules are now codified in many states. *See, e.g.*, TEX. PROB. CODE § 37A (Vernon 2003). *Cf.* UNIFORM PROBATE CODE § 2-801 (1982).

In an important early tax case decided decades before ERISA's enactment, *Brown v. Routzahn*, 63 F.3d 914 (6th Cir.), *cert. denied,* 290 U.S. 641 (1933), the Sixth Circuit held that a recipient's renunciation, that is, a waiver or refusal of the right to receive an inheritance, could not constitute a "transfer" under federal tax law. *Id.* at 917.

More than a decade before ERISA's enactment, a federal district court held that a son's disclaimer, that is, waiver, of a legacy under his mother's will was valid, and the property he renounced was not property "belonging to" the son to which a federal tax lien may attach under section 6321. *See U.S. v. McCrackin,* 189 F. Supp. 632, 634-37 (S.D. Ohio 1960). The Tenth Circuit held that a disclaimer is not a debtor's transfer of property under the Bankruptcy Code. *See Hoecker v. United Bank of Boulder,* 476 F.2d 838, 840-41 (10th Cir. 1973). State statutes permitted a beneficiary to disclaim an interest notwithstanding a spendthrift restriction. Under pre-ERISA common law, disclaimers (waivers of a right to receive property) were *not* transfers, alienations, or assignments. Those principles remain valid today. In *Neilson v. Cass County Social Services Board,* 395 N.W.2d 157, 159 (N.D. 1986), for example, North Dakota's Supreme Court held that a disclaimer of an estate was not a transfer of property disqualifying the

disclaimant's receipt of future medical assistance from the state. *See also* UNIFORM PROBATE CODE § 2-801(d)(2) (1982).

Although ERISA is a "comprehensive and reticulated statute," this Court observed in *Firestone,* 489 U.S. at 108-109, there are major gaps in its coverage. In *Firestone,* this Court held that a *de novo* standard of review governed benefit denials because "ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations." This Court declared that:

> ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the law of trusts." .... Given this language and history, we have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans."

Firestone, 489 U.S. at 110-111, *citing Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 56 (1987).

Other gaps in ERISA have long required resort to federal common law. *See, e.g., Heasley v. Belden & Blake Corp.,* 2 F.3d 1249, 1257 n. 8 (3d Cir. 1993) ("*Firestone* authorizes the federal courts to develop federal common law to fill gaps left by ERISA. . . ." due to no statutory guidance for construing plan language); *Phoenix Mut. Life Ins. Co. v. Adams,* 30 F.3d 554, 562 (4th Cir. 1994) ("ERISA is silent on the

matter of which party shall be deemed beneficiary among disputing claimants."); *Administrative Committee for the H.E.B. Investment and Retirement Plan v. Harris,* 217 F. Supp.2d 759, 761-62 (E.D. Tex. 2002) (ERISA's silence about payouts to beneficiaries who murder plan participants requires reliance on federal common law and state law); *New Orleans Electrical Pension Fund v. DeRocha,* 779 F. Supp. 845, 850 (E.D. La. 1991) (same); *Mendez-Bellido v. Trustees of ATU Pension Fund,* 709 F. Supp. 329, 330 (E.D.N.Y. 1989) (same).

As the Fifth Circuit explained in *Rhoades,* 196 F.3d at 600, a majority of this country's courts reject any idea that ERISA's "spendthrift" provision limits a voluntary waiver of ERISA benefits executed by *both* a plan participant *and* a plan beneficiary. After considering the analyses in *Boggs, Finz v. Schlesinger,* 957 F.2d 78, 82 (2d Cir. 1992) and *Lumpkin v. Envirodyne Industries, Inc.,* 933 F.2d 449, 455 (7th Cir. 1991), the *Rhoades* panel ruled as follows:

> [T]he anti-alienation provision of ERISA is not absolute. Courts, including this one, have noted that there is an exception to ERISA's anti-alienation provision for a knowing and voluntary waiver of retirement benefits that is executed to reach a settlement . . . [citations omitted].

Rhoades, 196 F.3d at 598-99 (emphasis supplied).

The difference between waivers and assignments/alienations is critical. ERISA's anti-alienation

provision is intended to prevent spouses who *receive* benefits from unwisely squandering them. *McGowan,* 423 F.3d at 256 (Fuentes, J., dissenting). Here, however, ex-wife Kennedy received no property.

Congress designed this spendthrift statute to "ensure that the employee's accrued benefits are actually available for retirement purposes," by preventing unwise assignment or alienation. H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 1974, *reprinted in* 1974 U.S. Code Cong., Admin. News 4639 at 4670, 4734. It safeguards against predators preying on participants and beneficiaries by offering inadequate immediate gratification in exchange for pension benefits. *Id., citing Coar v. Kazimir,* 990 F.2d 1413, 1420 (3d Cir. 1993) (noting that its legislative history suggests that it was "intended to protect plan beneficiaries by ensuring that plan assets are used only for payment of benefits"). *See also McGowan,* 423 F.3d at 256-57 (Fuentes, J., dissenting).

Congress also sought to preclude creditors from gaining access to retirement benefits. In *Guidry v. Sheet Metal Workers National Pension Fund,* 493 U.S. 680 (1990), this Court characterized ERISA's anti-alienation statute as "an antigarnishment provision." *See also Coar,* 990 F.2d at 1420-21 (*citing Guidry* and stating that the legislative history that speaks of "a garnishment or levy" and the statute as an "anti-garnishment provision . . . ," *id.,* 990 F.2d at 1420-21). The SIP's "Nonassignment" provision reflects this strategy, stating that no plan benefits shall "be subject

to attachment or other legal processes for debts." JOINT APPENDIX at 50-51.

Congress' spendthrift and protection-from-creditor concerns do *not* apply to voluntary divorce decree waivers. Only a participant, *e.g.*, the late William Kennedy, would derive benefits from ex-wife Kennedy's waiver (because one cannot waive rights to a third party), whereas anyone, including telephone predators who like to sell magazine subscriptions, aluminum siding, and timeshare units, could provide goods or services to pay a beneficiary for an assignment or alienation.

Like the *Coar* set-off, ex-wife Kennedy's waiver is conceptually distinct from assignment and alienation. Thus, the Third Circuit's statement that "inasmuch as a set-off is not an alienation, then the absence of an exception allowing a set-off to the restraint on alienation is meaningless" applies with equal force here. *McGowan*, 423 F.3d at 256-57 (Fuentes, J., dissenting) (*citing Coar*, 990 F.2d at 1424). The legislative history's concern about garnishments and other involuntary alienations shows that Congress was not targeting voluntary divorce decree waivers when it enacted ERISA's anti-alienation provision.

E. ERISA's QDRO provision does not bar non-QDRO waivers of ERISA benefits enforceable under federal common law.

ERISA's QDRO provision, 29 U.S.C. § 1056(d)(1), begins by stating that, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." As discussed above, a divorce decree waiver is *not* an alienation or assignment.

ERISA's QDRO provision does not bar enforcement, under federal common law, of the attorney-negotiated, arms' length, court-approved, voluntary divorce decree waiver because that waiver was neither an assignment nor an alienation. In *Fox Valley,* the *en banc* Seventh Circuit held that, "[t]he QDRO requirements specify the procedures necessary to assign benefits, but those procedures need not be followed when a non-participant is waiving an interest in pension benefits. ERISA allows beneficiaries to waive their interests in benefits." *Id.,* 897 F.2d at 279. *See also McGowan,* 423 F.3d at 259 (Fuentes, J., dissenting) ("Because the QDRO exception applies only to assignments and alienations, it is also irrelevant to this case.").

In 1984, Congress enacted REA to amend ERISA by authorizing the use of QDROs. It did so, in part, to provide a clear safe-harbor mechanism to protect a non-participant spouse's interest in benefits. *See, e.g., Dorn v. Int'l Brotherhood of Electrical Workers,* 211

F.3d 938, 942 (5th Cir. 2000). Congress intended QDROs to serve as *one* exception to ERISA's general prohibition on alienation or assignment of benefits to allow the attachment of an employee's pension benefits to satisfy his or her family support obligations. *See* S. Rep. No. 98-575, at 18-19, *reprinted in* 1984 U.S.C.C.A.N. 2547-49 and 2564-65 (1984). Congress's Subcommittee on Labor stated that ERISA was enacted to ensure American employees a retirement with "financial security and dignity." *See* H. R. Rep. No. 95-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646.

ERISA's language and legislative history demonstrate that the statute's primary purpose is to protect the interests of participants and beneficiaries. The convenience of plan-administrators – DuPont's justification for thwarting the reasonable expectations of William and Liv Kennedy, their attorneys, and Jasper County District Judge Lawlis – was always a *secondary* objective subordinate to Congress' prime directive. *See* Jeffrey Gorris, *Waivers of ERISA Plan Benefits: Preventing Judicial Interpretations of a Complex Statute from Frustrating the Statute's Simple Purpose*, 155 U. PA. L. REV. 717, 737 (2007); Ryan P. Barry, Comment, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary*, 31 CONN. L. REV. 735 and 749 n. 78 (1999).

Expressions of congressional intent to align the distribution of pension benefits with the reasonable expectations of employees fill the Congressional Record. *See* Gorris, 155 U. PA. L. REV. at 737, *citing*

Welfare and Pension Plan Legislation: hearings on H.R. 2 and H.R. 462 before the H. Subcomm. on Labor of the Comm. on Educ. and Labor, Part 2, 93d Cong. 1 (1973). That legislative history includes the statement of Rep. John H. Dent, Chairman, Subcomm. On Labor. *See also* Gorris, at 737, *citing* 120 Cong. Rec. H29, 197 (1974). *See also* 29 U.S.C. §§ 1001-1461; Pub. L. No. 93-406, 88 Stat. 829 (1974).

In the late 1960s, New York Senator Jacob Javits first proposed the Welfare and Pension Plans Disclosure Act that evolved into a labor bill and resulted in ERISA. *See* Keron A. Wright, *"Stuck on You": The Inability of an Ex-Spouse to Waive Rights under an ERISA Pension Plan [McGowan v. NJR Serv. Corp.,* 423 F.3d 241 (3d Cir. 2005)], 45 WASHBURN L.J. 687, 703 n. 165 (Spring 2006); Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA,* 76 IOWA L. REV. 431, 444 (1991). Senator Javits stated that his amendment was aimed at "strengthening greatly the disclosure requirements [and] . . . establishing fiduciary standards to protect the rights of workers covered by . . . pension benefit[ ] plans." *Id.* "The fundamental purpose," he explained, was to protect "interests of the participants and beneficiaries of employee welfare and pension benefit plans." *Id.* and 119 Cong. Rec. 127, 12075 (1973).

Senator Javits explained that Congress intended federal courts to develop substantive law to govern rights under the plans, thus foreseeing the federal

common law of ERISA. Wright, 45 WASHBURN L.J. at 703 at n. 172; Gorris, 155 U. PA. L. REV. at 737; Michael J. Collins, *It's Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation,* 16 LAB. LAW. 391, 399 n. 61 (2001). In addition, Senator Williams compared ERISA to the Labor-Management Relations Act of 1947, which had a well-developed common law at the time of ERISA's passage. *Id.* (*citing* 120 Cong. Rec. 29933 and 29942 (1974), reprinted in 1974 U.S.C.C.A.N. 5177, 5188).

Senator Javits observed that ERISA was intended to serve as "a pension 'bill of rights.'" Barry, 31 CONN. L. REV. at 750 (*citing* 120 Cong. Rec. 29935 (1974)). *See also Pilot Life*, 481 U.S. at 1557-58. Prior to enactment, the Chair of the General Subcommittee on Labor explained that ERISA's "most important purpose will be to assure American workers that they may look forward . . . to a retirement with financial security and dignity." H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4646.

This Court emphasized the statute's focus on providing benefits in *Boggs,* 520 U.S. at 852 ("Besides the anti-alienation provision, Congress has enacted other protective measures to guarantee that retirement funds are there when a plan's participants and beneficiaries expect them."). ERISA "is concerned with improving the fairness and effectiveness of qualified retirement plans in their role of providing retirement income." *See* Gorris, 155 U. PA. L. REV. at 737, *citing* H.R. Rep. No. 93-807, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670 and 4676.

The 1984 REA amendments treat spouses equitably by giving them an equal say in making pension decisions (as happened here where the divorcing Kennedys negotiated as equals). *See* REA, Pub. L. No. 98-397, 98 Stat. 1426 (1984). The new law made it clear that a QDRO is *a* proper method for preserving the interests of a former spouse in pension benefits. *See* S. Rep. No. 98-575, 98th Cong., 2d Sess. 19, at 12, reprinted in 1984 U.S.C.C.A.N. 2547, at 2565 (1984). Congress did not view a QDRO as *conflicting* with ERISA's anti-alienation provision. A Senate Committee Report states that "in the case of a [QDRO], the bill *clarifies* that such order does not result in a prohibited assignment or alienation of benefits under the spendthrift provisions of the Code or ERISA." Sen Rep. No. 98-575, at 3 (1984) (emphasis supplied), as reprinted in 1984 U.S.C.C.A.N. 2547, at 2549. The congressional use of the term "clarifies" demonstrates that it did not understand its "spendthrift" anti-alienation provision to apply to QDROs even before it enacted REA. *See* Gorris, 155 U. PA. L. REV. at 741 and 741 n. 32.

Congress' choice of *clarifying* language acknowledged its members' understanding that ERISA's anti-alienation provision contained inherent exceptions. *Id. See, e.g., Tenneco, Inc. v. First Va. Bank of Tidewater*, 698 F.2d 688, 690 (4th Cir. 1983) ("A judicial exception has been carved out of this seemingly absolute prohibition [against alienations and assignments]. If the debt is support due the employee's spouse or children, his interest in the plan is subject

to garnishment."); *American Telephone & Telegraph Company v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (same); *Cody v. Riecker*, 454 F. Supp. 22, 24 (E.D.N.Y. 1978), *aff'd*, 594 F.2d 314 (2d Cir. 1979) (same). In *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), this Court noted that:

> Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction . . . the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Id. at 381-82.

In resolving the QDRO issue, this Court should give due consideration to Congress' intent to *clarify* a statutory scheme that already recognized exceptions to ERISA's anti-alienation provision. The QDRO statute is a non-exclusive safe harbor that provides one clear but complicated way to protect the interests of divorcing spouses – if a QDRO makes sense under the circumstances. But in creating one safe harbor, Congress did not bar the use of voluntary waivers traditionally available in state divorce courts and enforceable under the federal common law of ERISA. *See* Gorris, 155 U. PA. L. REV. at 741-42.

The Kennedys ended their marriage as equals in a settlement the court deemed to be fair and right. Liv Kennedy made a voluntary waiver in a court-approved

settlement memorialized as a state court judgment. She did not alienate or assign property; she disclaimed it. In this case, the Fifth Circuit erred by holding that a QDRO is the *only* way a divorcing spouse can waive pension benefits under ERISA.

II. The Fifth Circuit erred in holding that ERISA's QDRO provision is the *only* way a divorcing spouse can waive an ex-spouse's pension benefits.

A. "Federal Common Law" courts properly recognize the validity of a divorcing spouse's voluntary, knowing and express waiver of pension benefits.

After in-depth examinations of the statute's language and legislative history, a majority of this nation's most respected judges and justices have recognized that federal common law is an essential aspect of ERISA's statutory scheme. Those courts include, *inter alia,* the following:

First Circuit: *Metropolitan Life Ins. Co. v. Flinkstrom*, 303 F. Supp.2d 34, 39-43 (D. Mass. 2004);

Fourth Circuit: *Estate of Altobelli v. IBM Corp.*, 77 F.3d 78, 81-82 (4th Cir. 1996);

Fifth Circuit: *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer*, 354 F.3d 348, 359 (5th Cir. 2003), *rhg. and rhg. en banc denied*, 89 Fed. Appx. 905 (5th Cir.), *cert. denied*, 541 U.S. 1072 (2004); *Brandon v. Travelers Ins. Co.*, 18

F.3d 1321 (5th Cir. 1994); *Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 355 (5th Cir. 1991);

Seventh Circuit: *Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003); *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown,* 897 F.2d 275, 280-81 (7th Cir.) (*en banc*), *cert. denied,* 498 U.S. 820 (1990);

Eighth Circuit: *Hill v. AT&T Corporation,* 125 F.3d 646, 648 (8th Cir. 1997); *National Auto Dealers & Assocs. Retirement Trust v. Arbeitman,* 89 F.3d 496, 500 (8th Cir. 1996); *Mohamed v. Kerr,* 53 F.3d 911, 914 (8th Cir.), *cert. denied,* 516 U.S. 868 (1995); *Lyman Lumber Company v. Hill,* 877 F.2d 692, 693-94 (8th Cir. 1989); and

Tenth Circuit: *Metropolitan Life Ins. Co. v. Hanslip,* 939 F.2d 904, 907 (10th Cir. 1991).

At least four state supreme courts use this Federal Common Law approach to ERISA waivers: Michigan, Nebraska, New York, and Texas.

Michigan: *Sweebe v. Sweebe,* 474 Mich. 151, 712 N.W.2d 708, 712 (2006) and *MacInnes v. MacInnes,* 677 N.W.2d 889, 892-93 (Mich. Ct. App. 2004);

Nebraska: *Strong v. Omaha Constr. Ind. Pension Plan, Inc.,* 270 Neb. 1, 701 N.W.2d 320, 327 (2005) (*per curiam*);

New York: *Silber v. Silber,* 99 N.Y.2d 395, 402-404, 786 N.E.2d 1263 (2003); and

Texas: *Keen v. Weaver,* 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003).

The opposing "Plan Documents" courts, which refuse to recognize waivers and insist on looking only to corporate beneficiary designations, include at least three circuits:

Second Circuit: *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993) (in *dicta*);

Third Circuit: *McGowan v. NJR Service Corp.*, 423 F.3d 241, 244-45 (3d Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1118, 166 L. Ed. 2d 906 (2007) (Maj. Op.); and

Sixth Circuit: *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990); *Metropolitan Life Ins. Co. v. Marsh,* 119 F.3d 415, 421 (6th Cir. 1997); *Metropolitan Life Ins. Co. v. Pressley,* 82 F.3d 126, 130 (6th Cir. 1996).

A recent split within the camp of the "Federal Common Law" courts separates "QDRO – *one* form of waiver" from "QDRO is the *only* waiver" courts. The "QDRO – *one* form of waiver" courts hold that a beneficiary of a *pension* plan can waive benefits through a divorce decree. *Fox Valley,* 897 F.2d at 280-81; *Altobelli,* 77 F.3d at 81-82; *Keen,* 121 S.W.3d at 724-26. *See also McGowan,* 423 F.3d at 256-260 (Fuentes, J., dissenting).

The "QDRO is the *only* waiver" courts hold that ERISA's QDRO provision precludes enforcement of an ex-spouse's voluntary divorce decree waiver. *McGowan v. NJR Service Corp.*, 423 F.3d 241, 244-45 (3d Cir. 2005) (Maj. Op.) (addressing a Qualified Joint Survivor Annuity under 29 U.S.C. § 1055); *Smith v.*

E. I. DuPont de Nemours & Co., 402 F. Supp.2d 519, 523 (D. Del. 2005). *Cf. Hamilton v. Washington State Plumbing & Pipefitting Indus. Pension Plan*, 433 F.3d 1091, 1100 n. 10 (9th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 86, 166 L. Ed. 2d 32 (Oct. 2, 2006) (*citing McGowan* in its analysis of QDRO law); *Alberici Corp. v. Davis*, No. 4:04-CV-545 CEJ, 2006 U.S. Dist. LEXIS 68539 at *7-12 (E.D. Mo. Sept. 12, 2006), *aff'd*, 186 Fed. Appx. 690 (8th Cir. 2006) (*per curiam*).

In this case, the Fifth Circuit joined the "QDRO – *Only* Form of Waiver" courts. *Kennedy v. Plan Administrator for the DuPont Savings & Investment Plan*, 497 F.3d 426, 431-32 (5th Cir. 2007). It broke with the Texas Supreme Court's precedent in *Keen*, 121 S.W.3d at 724-26, which adhered to this "Federal Common Law" rule that voluntary waivers must be enforced. *Kennedy* conflicts with Fifth Circuit precedent by carving an exception for ex-spouse cases involving QDROs. The court ruled that "[t]hose cases are inapposite" because they "concerned ERISA-governed life-insurance policies, which are "welfare plan[s]" defined by 29 U.S.C. § 1002(1) and held that "ERISA's anti-alienation provision was *not* at issue." Yet it ignored the analysis in *Rhoades*, 196 F.3d at 599, a pension case, where the Fifth Circuit discussed the interaction of waivers and ERISA's anti-alienation provision:

> This court in *Stobnicki v. Textron*, 868 F.2d 1460, 1465 (5th Cir. 1989) held that "a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an

> assignment made pursuant to a bona-fide settlement of such a controversy is not invalidated by the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1)."
>
> * * *
>
> In *Stobnicki,* this court thoroughly examined the legislative history of ERISA and the effect that the legislative history has on the scope of the anti-alienation provision. We held that courts "will not ascribe to Congress the intent of making unreasonable law – one requiring terminal litigation rather than settlements as does the general law," and therefore the apparent statutory bar against alienation of pension benefits should yield to reason and allow benefits to be voluntarily waived for settlement purposes.

Rhoades, 196 F.3d at 599 (*citing Stobnicki,* 868 F.2d at 1463-64). The Fifth Circuit no longer follows *Stobnicki's* rule of federal common law reason.

The *Kennedy* opinion overrides cases where the circuit upheld waivers of a beneficiary's right to receive ERISA benefits. *Brandon,* 18 F.3d at 1322-24 (where the ex-spouse and the beneficiary of an ERISA life-insurance plan, waived them through a divorce decree). The Fifth Circuit's opinion abandons its analyses in *Brandon,* 18 F.3d at 598, and *Rhoades,* 196 F.3d at 598, where the circuit held that ERISA's "anti-alienation provision is not absolute." This disregard for precedent increases uncertainty among participants and beneficiaries and leads to more

litigation, which is extraordinarily expensive for heirs and estates.

Rather than carrying out DuPont's fiduciary duties under ERISA by filing an interpleader or declaratory judgment action to determine the rightful recipients of the late William Kennedy's SIP account, a DuPont paralegal did the easy but wrong thing. He did so even after the Estate placed DuPont on notice *five times* about its claims to SIP proceeds. JOINT APPENDIX at 66 ¶ 2. The Fifth Circuit ignored DuPont's breach of fiduciary duties and focused, erroneously, on the SIP administrator's convenience. Additionally, the Fifth Circuit erred in setting forth the policy grounds and case law it relied upon in denying the Estate William Kennedy's SIP benefits.

Similarly, in *McGowan*, the majority erred in holding that a beneficiary had not effectively waived her rights to her ex-husband's pension plan. In that decision, the Third Circuit opted not to recognize that ERISA's overriding policy objective is to protect participants and their beneficiaries. It failed to properly analyze ERISA's legislative history, which should have persuaded the court to apply the federal common law approach. It not only misinterpreted ERISA statute, but also conferred an undeserved windfall on an ex-spouse.

On page 6 of its *Certiorari* Response, DuPont stoutly averred that "there is no division of authority on whether ERISA's anti-alienation provision bars a beneficiary's waiver of pension plan benefits." Like a

bold assertion that governmental conspirators filmed the Apollo 11 landing in an Arizona film studio, DuPont's argument commands attention. Contrary to DuPont's argument, there *is* a pervasive and persistent circuit split.

On pages 7-8 of its Response, DuPont chastised Kennedy for citing "two out-dated decisions by the Seventh and Fourth Circuits which took the position that the ERISA anti-alienation provision did not apply to beneficiaries of a pension plan in connection with the dissolution of a marriage." DuPont insisted that the Fifth Circuit's decision does not conflict with the Seventh Circuit's *en banc* decision in *Fox Valley* and the Fourth Circuit's *Altobelli* decision because those opinions "do not reflect current law." To the contrary: *Fox Valley* and *Altobelli* reflect current law. In *Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003), a case decided six years after *Boggs* and two after *Egelhoff*, the Seventh Circuit emphasized *Fox Valley's* continuing validity:

> Even where ERISA preempts state law with respect to determining beneficiary status under an ERISA-regulated benefits plan, ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary of such a plan. *Fox Valley* . . . [W]hen we are evaluating whether the wa[iv]er is effective in a given case, we are more concerned with whether a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question than

> with any magic language contained in the waiver itself.

Melton, 324 F.3d at 945-46 (*citing Fox Valley,* 897 F.2d at 282, *Manning,* 212 F.3d at 874, and *Clift,* 210 F.3d at 271). *See also Sweebe,* 712 N.W.2d at 712; *Lyman,* 877 F.2d at 693. Although DuPont dismisses *Fox Valley* as a spent shell, courts value it as live ammunition. If Seventh Circuit judges feared that *Boggs* invalidated *Fox Valley*, *Melton* gave them ample opportunity to say so. They did not. No Seventh Circuit panel has repudiated or limited *Fox Valley*.

DuPont's "outdated" label does not fit *Altobelli,* either, for Fourth Circuit courts have neither repudiated nor limited it. *See Graef v. Retirement Income Plan for Emples. of Albemarle Corp.,* No. 98-1188, 1998 U.S. App. LEXIS 31582, 22 Employee Benefits Cas. (BNA) 2280 at *11-16 (4th Cir. Dec. 17, 1998); *Neal v. GMC,* 266 F. Supp.2d 449, 454 (W.D.N.C. 2003). Other courts cite *Altobelli,* too. *See Smith v. Smith,* 919 So. 2d 525, 529 (Fla. Ct. App. 2005); *Young v. Anne Arundel County,* 146 Md. App. 526, 807 A.2d 651, 684 (2002); *Sweebe,* 712 N.W.2d at 712.

New York's highest court cited *Fox Valley* and *Altobelli* as authority for a waiver five years ago, when it decided *Silber v. Silber,* 99 N.Y.2d 395, 786 N.E.2d 1263, 1268 (N.Y. 2003), *cert. denied,* 2003 U.S. LEXIS 5579 (2003). In *Keen,* 121 S.W.3d at 725, the Texas Supreme Court relied on *Fox Valley* and *Altobelli* in a pension benefits case involving a divorce decree waiver similar to the one here. Two years

later, the Nebraska Supreme Court cited both cases in *Strong v. Omaha Construction Industry Pension Plan,* 270 Neb. 1, 701 N.W.2d 320, 327 (Neb. 2005), another pension case. DuPont can call *Fox Valley* and *Altobelli* "outdated," but several state supreme courts cite them as authority.

On page 9 of its *Certiorari* Response, DuPont announced that "[t]here is no conflict between" the Fifth Circuit's *Kennedy* decision and the Texas Supreme Court's contrary opinion in *Keen*. Although DuPont suggested that the Texas Supreme Court might follow the Fifth Circuit's lead, it ignored Justice Harriett O'Neill's compelling concerns about any approach to ERISA that threatened to reward murderers. *Keen,* 121 S.W.3d at 726 n. 4, *citing Admin. Comm. for the H.E.B. Inv. and Ret. Plan v. Harris,* 217 F. Supp.2d 759, 761-62 (E.D. Tex. 2002).

Under the *Kennedy* opinion, plan administrators pay those who slay – lest they run afoul of an inflexible interpretation of an anti-alienation rule. Almost five years have lapsed since the June 19, 2003 *Keen* decision – along with 84,316 Texas divorces in 2003 and 81,324 in 2004[4] – but DuPont cannot cite a Texas case that even questions *Keen*. The Fifth Circuit pits state courts against their federal counterparts in the

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[4] *See, e.g.,* Center for Disease Control, NATIONAL VITAL STATISTICS REPORTS, vol. 54, no. 20 (July 21, 2006), Table 3, available at http://0-www.cdc.gov.pugwash.lib.warwick.ac.uk/NCHS/data/nvsr/nvsr54/nvsr54_20.pdf. Petitioner requests judicial notice of these statistics under Federal Rule of Evidence 201.

Southern, Northern, Eastern, and Western Districts of Texas. The potential for forum-shopping and conflicts between state and federal judiciaries make this case significant to Texas' 23,507,783 people and its courts.[5]

In *Silber,* New York's highest court refused to hold that a QDRO is the only way to waive pension benefits under ERISA. That QDRO permitted the participant's ex-spouse to receive a separate interest in his pension benefits, yet contained a voluntary waiver. "All ownership and interest in the balance of the accumulations in all contracts issued by the Pension Plan [TIAA-CREF] will belong to Participant." During the half year that followed that QDRO's execution, the participant, Robert Silber, died without altering his ex-spouse's beneficiary-designation. The New York Court of Appeals rejected the argument that ERISA's anti-alienation provision barred the waiver, reasoning that the QDRO exemption was *consistent with* a right of divorcing spouses to waive pension benefits. "Strict application of ERISA requirements, while likely serving the ends of uniformity, may not serve the ends of fairness when it comes to effectuating the clear intent of parties to an agreement." *Silber,* 99 N.Y.2d at 403-404.

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[5] U.S. Census Bureau, available at quickfacts.census.gov/qfd/states/48000.html (Jan. 18, 2008). Petitioner requests judicial notice of Texas' population.

DuPont tried to sugarcoat the Nebraska Supreme Court's *Strong* medicine by chiding that court for "largely ignoring the [ERISA] anti-alienation provision." Response at 11 n. 7. *Strong,* a well-reasoned pension case that cited *Fox Valley* and *Altobelli,* is important not only to every pension-plan participant, spouse, or potential beneficiary among Nebraska's 1,768,331 residents, but also to all lawyers and judges who must decide whether to recognize a voluntary divorce decree waiver. Nebraska's Justices did not "ignore" ERISA's anti-alienation provision, as DuPont suggested. Instead, they decided that case after analyzing the QDRO statute. The court discussed the QDRO/anti-alienation interaction at the outset:

> We note that ERISA contains anti-alienation provisions that prevent plan participants from unwisely alienating their interests in ERISA-regulated pension plans. 29 U.S.C. § 1056(d). A qualified domestic relations order (QDRO) is an exception to the anti-alienation rule. . . . It is undisputed that the divorce decree failed to comply with these requirements and therefore was not a QDRO.

Strong, 701 N.W.2d at 325. The Estate agrees that a QDRO is "an exception" to the anti-alienation rule, and asks this Court to approve the Nebraska Supreme Court's conclusion that a QDRO is not the *only* exception.

The growing judicial uncertainty about QDROs is important to more than one hundred million

Americans who live in the states subject to this circuit split. The Seventh Circuit had a population of 24,701,996 in 2006.[6] There were 28,254,835 people in the Fourth Circuit and 30,706,091 in the Fifth. Since the New York Court of Appeals followed the Seventh and Fourth Circuits in *Silber,* and since the Nebraska Supreme Court did the same in *Strong,* this Court should consider New York's 19,306,183 and Nebraska's 1,768,331 people. And that concerns the narrow QDRO issue.

The Department of Labor's *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2006* (U.S. Bureau of Labor Statistics, August 2006) states that fifty-four percent of workers had retirement plans, and fifty-one percent participated in one. *Id.* at 1, Summary 06-05, Tables 7 and 8, http://www.bls.gov/ncs/ebs/sp/ebsm0004.pdf. In 2005, there were 2,230,000 marriages in the U.S.A. The marriage rate that year, per 1,000 people, was seven and one-half percent (7.5%), while the divorce rate was three point six percent (3.6). A little less than half of marriages end in divorce. *See* http://divorcemag.com/statistics/statsUS.shtml (*quoting* U.S. Census Bureau and National Center for Health Statistics). Since fifty-one percent (51%) of workers have pension plans, this appeal will have a major impact on at least 300,000 to 400,000

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[6] The U.S. Census Bureau statistics, quickfacts.census.gov/qfd/states/48000.html (Jan. 18, 2008), appear on Petitioners' Reply Brief at 10.

divorcing workers per year, as well as their heirs, beneficiaries, families, and attorneys.

Resolution of this pervasive and persistent division of authorities at the interaction of divorce, pension, property, and common law will affect millions of pension-plan participants whose marriages end in divorce, as well as their spouses, their children, and their heirs.

B. Given her use of a QDRO to protect her interest in part of William Kennedy's DuPont benefits, ex-wife Kennedy's waiver of pension proceeds did not violate ERISA.

The Fifth Circuit overrode the reasonable expectations of the Kennedys and their divorce court lawyers, who had negotiated what the Jasper County District Judge found to be a fair and reasonable division of their marital assets. The Kennedys' lawyers obtained the divorce court's express approval of that compromise settlement, in which ex-wife Kennedy received a partial assignment of William Kennedy's pension through a QDRO and then waived the rest through a knowing, voluntary waiver, six weeks after the Fifth Circuit issued its April 20, 1994 decision in *Brandon,* 18 F.3d at 1325.

Brandon reflects ERISA law in Texas when the Kennedys divorced. In *Brandon,* the Fifth Circuit enforced an ex-spouses' divorce decree waiver of her right to receive the plan-participant's life-insurance

proceeds. The court considered the opposing opinions about the enforceability of divorce decree waivers in *Fox Valley,* 897 F.2d at 280, on the one hand, and *McMillan v. Parrott,* 913 F.2d 310, 311 (6th Cir. 1990), on the other hand. "We have previously held that 'a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an assignment made pursuant to a bona fide settlement of such a controversy is not invalidated by the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1)." *Brandon,* 18 F.3d at 1324 n. 4 (*citing Stobnicki,* 868 F.2d at 1465).

"The state courts of our country often oversee the type of agreement signed by the Brandons, which, in the ordinary case, offer sufficient protection of the rights of the parties," *Brandon,* 18 F.3d at 1327. "The oversight of the family courts is suitably armored to protect the rights at stake in this case and we find the approach of this opinion preferable to asserting that ERISA should act as a surrogate law of divorce." *Id.* The Kennedys' divorce decree fell squarely within the letter of ERISA law as it existed in Texas at that time.

On page 12 of its Response, DuPont criticizes the late William Patrick Kennedy for not doing one of three different things to ensure that his SIP benefit went to someone other than ex-wife Kennedy. But the attorneys who drafted William and Liv Kennedy's 1994 divorce decree agreed that Liv Kennedy would knowingly, intelligently, and expressly waive her rights to the DuPont SIP benefits. The Fifth Circuit's

Stobnicki and *Brandon* decisions of 1989 and 1994, as well as the Seventh Circuit's *en banc, certiorari* denied *Fox Valley* decision of 1990, would have led courts and attorneys to believe that the Kennedys' court-approved 1994 division of marital property would be respected rather than rejected thirteen years later.

There was no need for the divorcing Kennedys to submit a QDRO for the SIP benefits because none of the remaining proceeds were subject to property-division in divorce court. Petition at APP. 44 (district court opinion). After all, ex-wife Kennedy had agreed that she would receive no SIP benefits belonging to William Kennedy.

A QDRO *transfers* the right to receive benefits to an alternate payee. It "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable . . . " 29 U.S.C. § 1056(d)(3)(B); Petition at APP. 77. A QDRO differs from a *waiver*, in which a recipient disclaims the right to receive a future transfer. A QDRO is a positive *assignment* rather than a negative *disclaimer*. Unless ex-wife Kennedy wanted to receive a portion of the SIP benefits, the creation of a QDRO covering her ex-husband's SIP benefits would have made no sense to the Kennedys, their lawyers, or their state divorce court judge.

The divorcing Kennedys agreed that ex-wife Kennedy had no right to receive the SIP benefits that

are the subject of this appeal. If the Kennedys, their attorneys, or the divorce court had wished to provide ex-wife Kennedy with an interest in the remaining SIP benefits, they could have put all of those funds into the QDRO they signed and used.

The disputed SIP benefits did not become payable at retirement but only on William Kennedy's death. Ex-wife Kennedy had no right to receive those benefits during William Kennedy's life. Application of the spendthrift provisions of ERISA to ex-wife Kennedy's waiver of benefits did not protect anyone's benefits until retirement. DuPont's payment came as a windfall to ex-wife Kennedy, who had "forgotten all about the account," but quickly burned through some $400,000 and then went to Norway, where she signed her affidavit. JOINT APPENDIX at 58-59. Invalidating a voluntary waiver of a transfer from plan participant William Kennedy did not advance ERISA's income-protection purposes. *See Altobelli,* 77 F.3d at 81 (*quoting Guidry,* 493 U.S. at 376). Affirmation of the Fifth Circuit's opinion does not further the ends for which ERISA was enacted.

The purpose of a spendthrift clause is to safeguard a stream of income for pensioners and their dependents. Adherence to an anti-spendthrift clause cannot justify splashing cash on spendthrift ex-spouses and then denying accountability for an egregious error of judgment. Between his ex-wife's waiver and his post-divorce designation of his daughter Kari Kennedy as his beneficiary, William Kennedy had good reason to believe that DuPont would tender

his SIP funds to his daughter or his estate. Instead, DuPont sent the money to Norway by way of his ex-wife, leaving William Kennedy's daughter Kari to pay William's creditors and the taxes that windfall imposed on his estate.

Did DuPont's Plan Administrator discharge the Plan's fiduciary duties by delegating its review of the Estate's claim to a paralegal and then conferring a huge windfall on William Kennedy's ex-spouse after it knew she had voluntarily waived any right to receive those pension benefits in an agreed divorce decree judgment? DuPont's actions do not constitute a reasonable discharge of a fiduciary's duties. DuPont turned the tragedy of William Kennedy's death into a travesty of justice.

C. A flexible federal common law analysis, as opposed to the Fifth Circuit's "QDRO is the only waiver" approach, ensures justice, fulfills the reasonable expectations of plan participants, heirs, and beneficiaries, and avoids undermining federalism.

1. The *Kennedy* opinion deprives judges of power to render just decisions under federal common law.

The Fifth Circuit's opinion undermines this Court's determination, in *Firestone*, 489 U.S. at 110, that federal courts have the power to shape federal common law. The panel should have applied the

Seventh Circuit's approach in *Fox Valley* to further the authority this Court granted to create and apply substantive law to issues not explicitly regulated by ERISA. *See* Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL'Y 541, 549 (1998).

The Fifth Circuit erred when it failed to consider ERISA Section 1104 as a whole and elevated a secondary concern, the convenience of plan administrators, over ERISA's prime directive to protect the interests of participants and beneficiaries. ERISA Section 1104(a)(1) imposes a fiduciary standard on the plan administrator, requiring him to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." The *Kennedy* panel should have adhered to its *Guardian Life, Brandon,* and *Stobnicki* rulings rather than follow the Third Circuit into *McGowan's* quagmire of confusion.

Federal Common Law courts recognize that ERISA does not define assignment or alienation and does not address waiver by a beneficiary, leaving the issue of beneficiary status to be determined under common law rules. The Fifth Circuit interpreted ERISA's QDRO provision rigidly, unnecessarily treating beneficiary designations on file at DuPont's headquarters as if they were "plan documents."

Since ERISA does not address waivers or conflicts between beneficiaries, the Fifth Circuit did not have to rule that DuPont's plan administrator was entitled to rely solely on an outdated beneficiary

designation superseded by a divorce decree. In *McGowan*, Sixth Circuit Judge Fuentes cautioned against using such a dogmatic approach:

> "Judge Van Antwerpen's opinion reads this provision as allowing all documents filed with the Plan to govern its administration, including forms filed to designate beneficiaries. However . . . I note in passing that the governing documents could reasonably be limited to those that set forth the terms of the plan."

McGowan, 423 F.3d at 258 n. 17 (dissent), referencing *McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan for U.S. Employees*, 340 F.3d 139, 143-44 (3d Cir. 2003) ("Clearly, the 'documents and instruments governing the plan' do not necessarily include all relevant documents and, in particular, do not necessarily include the plaintiff's claim file.").

William Kennedy tried to designate his daughter Kari as his sole beneficiary four days after his divorce. JOINT APPENDIX at 62. He sought to replace his ex-wife on DuPont's forms. His omission to de-designate his ex-wife on *all* DuPont's many forms need not preclude a court from enforcing her waiver if beneficiary designations are *not* part of DuPont's plans. The SIP plan did not address the enforceability of a divorcing spouse's voluntary waiver of pension proceeds. JOINT APPENDIX at 46-54.

In explaining its decision, this Fifth Circuit panel defined an "assignment or alienation" as "[a]ny direct

or indirect arrangement . . . whereby a party acquires from a participant *or beneficiary* a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant *or beneficiary*." Petition at APP. 8, *citing* 26 C.F.R. § 1.401(a)-13(c)(1)(ii). Under that rationale, an ex-spouse's voluntary disclaimer of benefits under Section 2518 of the Internal Revenue Code would violate ERISA's anti-alienation provisions since it would be an "indirect arrangement" through which someone gains an interest enforceable against a pension plan. But that ignores the common law precedent defining assignments and alienations quoted earlier in this Brief.

The Fifth Circuit has infringed on freedom of contract and a couple's power to amicably end an unsuccessful marriage. *Sweebe,* 712 N.W.2d at 712. The opinion will compel surviving spouses to accept pension benefits they may not need or want. But a surviving spouse might have good reason to avoid creating a taxable estate at death, a rationale that makes sense here, given the Estate's payment in more than $100,000 in estate taxes. Or a surviving spouse might wish to continue receiving governmental benefits unavailable if she received ERISA benefits. "What is a plan to do: sneak by the beneficiary's house at night, jimmy open a window, and pour the cash into the bedroom?" Comment, "Who Is the Payee, Part VIII: *Altobelli v. IBM* and the Other Beneficiary Waiver Cases," 14 ERISA LITIG. REPTR. 16, 16 (Aug. 1996).

The Fifth Circuit's opinion invalidates marital property settlements negotiated by attorneys and approved by family court judges who relied on the Internal Revenue Service's GENERAL COUNSEL MEMORANDUM 39,858, 1991 WL 776304 (Sept. 23, 1991) ("GCM 39,858") as a guide to ERISA's intricacies. Despite a warning that "[t]his document is not to be relied upon otherwise cited by taxpayers," estate planners, accountants, attorneys, and courts throughout the country have assumed that the IRS' General Counsel Memorandum has something useful to say about ERISA.[7]

The Estate is not *citing* GCM as *precedent*. *See Fox Valley,* 897 F.2d at 279 n. 2. It is not binding. IRS attorneys can change their minds and repudiate their analysis at any time. The Estate refers to it only to show the *consequences* of affirming a Fifth Circuit opinion that repudiates its reasoning. During the past seventeen years, divorcing spouses, their attorneys,

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[7] *See, e.g.,* Marcia Chadwick Holt, *Planning for Distributions from Qualified Plans and IRAs under the 2001 Proposed Regulations,* ALI-ABA (Aug. 2001), http://www.dgslaw.com/Attorneys/Holt.icm?showcase=Y (April 24, 2008) at MCH(I)-21 ("*GCM*. A General Counsel Memorandum stated that "qualified disclaimers" of benefits from qualified plans are neither an assignment nor an alienation of plan benefits contrary to IRC § 401(a)(13) and ERISA § 206(d). . . ."); Lawrence R. Barusch, *Retirement and the Estate Tax* (May 21, 2002), http://www.parsonsbehlelaw.com/CM/Articles/Retirement-and-the-EstateTax.asp (04/22/2008) ("GCM 39858 states that 'there is no evidence that Congress intended to preclude a spouse from disclaiming or renouncing benefits under a qualified plan after the participant's death. . . .'").

and family court judges have relied on it, and that reliance has real world consequences. That IRS memorandum states that "a disclaimer of benefits under a qualified plan does not constitute a prohibited 'assignment or alienation' of plan benefits" under ERISA. *Id.* It observes that the Bankruptcy Code, the Uniform Probate Code, and trust law recognize that waivers and disclaimers are not "transfers," and it states that its author finds "no evidence that Congress intended to preclude a spouse from disclaiming or renouncing benefits under a qualified plan payable after the participant's death." *Id. See also* Gorris, 155 U. PA. L. REV. at 742, 742 n. 136. An affirmation of the *Kennedy* opinion would dash to pieces spousal ERISA waivers in many marital property settlements, to the detriment of the spouses involved, their heirs, and the attorneys who crafted them in reliance on GCM 39,858.

In *Stobnicki*, an earlier Fifth Circuit panel warned that "[l]ittle comfort indeed . . . is to be found in litigating away pension plan benefits to satisfy the blind edicts of an anti-alienation provision that creates unjust and unanticipated consequences, frustrating the purpose of the law. Like other courts which have faced it, we therefore conclude that the apparent statutory bar against alienation of pension benefits must once again yield to reason and to the purposes for which the Act was written." 868 F.2d at 1464-65. This Court should reverse the *Kennedy* opinion to ensure that ERISA serves the interests Congress intended.

2. The opinion's distinctions between enforceable waivers of welfare benefits and unenforceable waivers of pension benefits undermines ERISA's goal of fostering nationally uniform plan administration.

The Fifth Circuit's recent distinction between enforceable divorce decree waivers of welfare benefits and unenforceable divorce decree waivers of pension benefits undermines ERISA's goals of uniform regulation. The opinion replaces one federal waiver rule with *three*. It requires plan administrators, divorcing spouses, family lawyers, and state court judges to:

(1) enforce voluntary divorce decree waivers of ERISA welfare benefits (life insurance, etc.);

(2) invalidate voluntary divorce decree waivers of ERISA pension benefits; and

(3) enforce voluntary non-marital waivers of ERISA pension benefits, as in *Stobnicki,* 868 F.2d at 1465.

Gaul was divisible into three parts, as Caesar observed, but ERISA waivers should not be. The Fourth and Seventh Circuits avoided such unnecessary complexity in *Altobelli* and *Fox Valley*. The New York Court of Appeals rejected such a distinction in *Silber*. So did the Nebraska Supreme Court and Texas Supreme Court in *Strong* and *Keen*.

In *Oglesby v. AT&T Corp.*, No. 06-11372, 2007 U.S. App. LEXIS 28502 (5th Cir. Dec. 10, 2007), the Fifth Circuit applied its *Kennedy* analysis to deny the

appeal of John Oglesby, a plan participant. Mr. Oglesby had unsuccessfully asked AT&T and a federal district court to invalidate his designation of his ex-wife as his pension-beneficiary after the couple annulled their marriage. Both refused to recognize that an annulment invalidates a marriage and a spousal benefits designation:

> The district court reasoned that because Oglesby had begun receiving benefits under the plan, his beneficiary designation was irrevocable. Therefore, Oglesby's former wife could not waive her future interest in the plan. . . . [I]n light of this court's recent decision in *Kennedy* . . . , which applied ERISA's anti-alienation provision to pension funds and ruled that a beneficiary cannot waive her future benefits in a plan, we affirm the district court's decision.

Id. at * 2.

The Fifth Circuit's *Oglesby* ruling restrains two citizens' fundamental liberty to decide when and how to end their marriage. In *Pimenides v. Deere & Co.*, Civ. No. CC-06-531, 2007 U.S. Dist. LEXIS 92825 (S.D. Tex. Dec. 18, 2007), on the other hand, another court granted a motion to dismiss a claim for life insurance benefits brought by a participant's ex-wife who sought her pro-rata share of the deceased's retirement benefits, despite her waiver of them in a divorce decree. Since the case involved an ERISA welfare plan, rather than a pension plan, the district court enforced the waiver. *Id.* at *3. The existence of

two contrary standards governing waivers of ERISA benefits undermines ERISA's goal of fostering "nationally uniform plan administration." *Egelhoff,* 532 U.S. at 148.

3. The opinion undermines federalism by invalidating state divorce decrees.

The Fifth Circuit's *Kennedy* opinion conflicts materially with the Texas Supreme Court's reasoning and ruling in *Keen,* 121 S.W.3d at 724-25, where the court enforced a divorce decree waiver under strikingly similar circumstances. The *Keen* Majority showed a better appreciation for the importance of federal common law waiver in its analysis:

> While Patsy [Keen]'s interpretation is simple and easy to apply, *we do not believe that ERISA's text prohibits a plan administrator from recognizing a beneficiary's waiver, disclaimer, or other repudiation of plan benefits.* First, other provisions of ERISA require plan administrators to look beyond beneficiary designations in plan documents to determine entitlement to plan benefits. For example, while ERISA generally prohibits a participant's assignment or alienation of pension benefits, since 1984 ERISA has provided a limited exception if the benefits are the subject of a qualified domestic relations order (QDRO). *See* 29 U.S.C. § 1056(d)(3)(A). A plan administrator presented with a QDRO that satisfies ERISA's fairly detailed requirements must pay an alternate payee designated in

> the QDRO rather than the beneficiary designated in plan documents. [Citations omitted.]. . . . And a spouse who is a designated beneficiary of a joint and survivor annuity may waive entitlement to those benefits under certain circumstances. 29 U.S.C. § 1055(c)(1)(A). Furthermore, the Supreme Court has recognized that ERISA welfare plan benefits may be garnished under state procedures. [Citations omitted.]

Keen, 121 S.W.3d at 724-25 (emphasis supplied) (*citing Boggs* and *Mackey v. Lanier Collection Agency & Serv. Inc.,* 486 U.S. 825, 841 (1988)). The Estate cited *Keen* on pages 11, 14, and 28 of its Appellee's Brief, making the Fifth Circuit aware that it could open a gaping chasm between Texas state courts and its four federal district courts.

The Fifth Circuit's ruling puts federal courts in the unenviable position of invalidating state court divorce decrees. Prior to this case, the Fifth Circuit respected the "long and venerable history" of "federal respect for state domestic relations law" regarding ERISA waivers. *See, e.g., Brandon,* 18 F.3d at 1326 (*quoting De Sylva v. Ballentine,* 351 U.S. 570, 580 (1956)). *Cf. McGowan,* 423 F.3d at 259 (Fuentes, J., dissenting).

As a result of this unnecessary state versus federal conflict, an attorney, plan-administrator, or judge in Texas cannot predict the outcome of an ERISA dispute about waiver in a divorce decree. The same issue pits state against federal court ERISA

waiver interpretations in Michigan, whose Supreme Court rejected the Sixth Circuit's ERISA waiver precedent, *i.e., McMillan,* 913 F.3d at 312, in favor of the *Fox Valley* and *Altobelli* Federal Common Law analysis. "[A] valid waiver is not preempted by ERISA and should be enforced . . . " the Michigan Supreme Court ruled in *Sweebe,* 712 N.W.2d at 712 (regarding a life insurance policy).

The first result of this federal versus state shoot-out will be forum-shopping. Savvy trial lawyers will file declaratory judgment and interpleader lawsuits in federal court if they want to negate voluntary divorce decree waivers. Equally canny advocates will file lawsuits in state courts to enforce freely-negotiated divorce decrees. *In the Matter of Scruggs* (*Scruggs v. Lowman*), 392 F.3d 124 (5th Cir. 2004) (*per curiam*) offers a cautionary tale. In that case, an ex-spouse voluntarily waived her right to recover pension benefits from her ex-husband in a Florida divorce decree in 1994. *Id.* at 126. Five years later, in 1999, the ex-husband sued the ex-wife in a Florida state court declaratory judgment action to enforce the divorce decree waiver so his daughter could receive pension proceeds as her inheritance. *Id.* at 126-27. When, in 2002, the daughter was about to win the Florida lawsuit, the ex-wife filed a bankruptcy in *Texas* to argue a federal "QDRO is the only waiver" case, invalidate the waiver, and nullify the pending Florida state victory for the decedent's daughter. The decedent's daughter eventually won the Florida state

court case and the bankruptcy appeal in the Fifth Circuit. *Id.* and 2004 WL 3252641 (April 1, 2004).

The Fifth Circuit's *Kennedy* opinion encourages forum shopping and creates conflicts between state and federal courts. Courthouse chaos will ensue. Vengeful and greedy divorcees will execute divorce court waivers of pension proceeds and then negate those agreements by filing federal declaratory judgment actions, using the Fifth Circuit's new *gotcha* case to renegotiate divorces salami-style, one slice at a time.

Should attorneys follow the Texas Supreme Court's 2003 pro-waiver, Federal Common Law ruling, or adhere to the Fifth Circuit's "QDRO is the *only* waiver" holding? How will plan administrators in Texas and Michigan make proper fiduciary decisions?

The Fifth Circuit's opinion undercuts common law principles enshrined in experience and codified in almost all states. The Texas Supreme Court's *Keen* opinion noted that "Section 9.302 of the Texas Family Code, known as the 'redesignation statute,' provides that the designation of a spouse as a retirement account beneficiary is rendered ineffective by a subsequent divorce." *Id.*, 121 S.W.3d at 723. Justice O'Neill observed that, "If the statute applied here, it would operate to award Rita's estate the plan proceeds as the alternate beneficiary." *Id.* That de-designation statute reflects a common law consensus that most people prefer to shower an inheritance on a

child rather than an ex-spouse. *See* John Langbein, *The Nonprobate Revolution and the Future of the Law of Succession,* 97 HARV. L. REV. 1108, 1135 (1984).

Over forty-five states have statutes revoking, on divorce, dispositions of property in favor of an ex-spouse. *See, e.g.,* CAL. PROB. CODE § 6122 (2007); GA. CODE ANN. § 53-4-49 (2007); 755 ILL. COMP. STAT. ANN. 5/4-7 (2008); N.J. STAT. ANN. § 3B:3-14 (2008); N.Y. C.L.S. E.P.T.L. § 5-1.4 (2008). *See generally* UNIFORM PROBATE CODE § 2-508 (1982). Some statutes revoke beneficiary designations of a former spouse. *See, e.g.,* TEX. FAM. CODE ANN. § 9.301 (2006); ARIZ. REV. STAT. ANN. § 14-2804 (2008); MICH. COMP. LAWS SERV. § 552.101 (2008); OHIO REV. CODE ANN. § 5815.33 (2008).

People who designate spouses as beneficiaries typically leave those designations unchanged after divorce only because they forget or because they expect courts to enforce divorce decree waivers. This Court should consider the consensus of common law courts and legislatures. In *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 (1957), this Court declared that, "Federal interpretation of federal law will govern, not state law. But state law, if compatible with the purpose of [Labor Management Relations Act] § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." *Id.* at 457 (citations omitted). The Fifth Circuit ignored the common law consensus and legislative experience that shape Federal Common Law.

4. The opinion undermines the power of judges to preclude wrongdoers, including murderers, from profiting by wrongdoing.

A refusal to recognize any Federal Common Law exception to ERISA's anti-alienation provisions fosters absurd results. As the Dissent recognized in *Egelhoff,* application of the minority approach would result in the perversity of a plan administrator having to give benefits to a named beneficiary who murdered the participant. *Egelhoff,* 532 U.S. at 159-160. Gorris, 155 U. PA. L. REV. at 745-46. The Fifth Circuit's opinion raises the real prospect of awarding windfalls to murderers who slay their own spouses.

Since the nineteenth century, courts have enforced the rule that equity will not permit a wrongdoer to profit by his wrongdoing. In *New York Mutual Life Insurance Company v. Armstrong,* 117 U.S. 591, 600 (1886), this Court held that "it would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken." In *Riggs v. Palmer,* 115 N.Y. 506, 22 N.E. 188, 190 (1889), the New York Court of Appeals held that, "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."

The Fifth Circuit undermined that federal common law directive by approving DuPont's payment of

William Kennedy's pension proceeds to an ex-wife who took with the left hand what she had waived with the right. Ex-wife Kennedy voluntarily waived any right to receive William Kennedy's pension proceeds in a court-approved marital property settlement, then accepted them. She profited by her iniquity and DuPont's indifference.

Any approach that looks only to a beneficiary designation encourages fraud, sharp practice, and the payment of blood money to killers who murder a plan participant spouse. The legislatures of almost every state have followed the lead of common law courts in enacting a series of slayer statutes that prohibit, *inter alia,* spouses from profiting by murdering a spouse. Under both the typical state slayer-statute and federal common law, a killer relinquishes all right to receive a participant's benefits by killing. As Justice O'Neill observed in *Keen's* majority opinion, courts following *Egelhoff* have held that "a murderer should not be permitted to receive benefits from a victim's plan, either under a slayer statute or under federal common law." *Keen,* 121 S.W.3d at 726 n. 4, *citing Administrative Committee for the H.E.B. Investment and Retirement Plan v. Harris,* 217 F. Supp.2d 759, 761-62 (E.D. Tex. 2002). But, under either the zero-flexibility "QDRO is the *only* waiver" test, a "beneficiary-designee" husband who slays his working wife gets to pocket her pension.

If there are no exceptions to ERISA's anti-alienation rule for divorcing spouses, then federal common law provides no basis for denying a beneficiary-designee

murderer pension proceeds. This is not a theoretical proposition. In *Mendez-Bellido v. Trustees of ATU Pension Plan,* the court applied the New York Court of Appeals' *Riggs* rule that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity . . . " to bar a surviving spouse from recovering pension proceeds after the spouse pled guilty to manslaughter. *Id.,* 709 F. Supp. 329, 330 (E.D.N.Y. 1989). ERISA did not preclude application of *Riggs'* common law rule.

In *New Orleans Electrical Pension Fund v. DeRocha, supra,* 779 F. Supp. 845, 850 (E.D. La. 1989), the court held that ERISA was silent about the rights of survivors after a slaying spouse received five years probation for manslaughter. Citing federal common law, the court denied pension benefits to the killer. *Id.*

That same court confronted another slayer in *New Orleans Electrical Pension Fund v. Newman,* 784 F. Supp. 1233, 1236 (E.D. La. 1992), where the widow received a fifteen year prison sentence. After analyzing ERISA's anti-alienation provision, that court cited federal common law and again refused to reward a killer with benefits despite that plan's beneficiary designation. *Id.*

This Court should avoid rewarding murderers – and people who waive their rights in return for valuable consideration, only to demand more money later. It should hold that traditional federal common law principles govern ERISA. A flexible approach that

utilizes centuries of common law experience and avoids irrational outcomes. *See* Gorris, 155 U. PA. L. REV. at 746.

III. Enforcing voluntary waivers of ERISA benefits under federal common law will not materially increase the burdens of ERISA plan administrators.

The enforcement of voluntary divorce decree waivers will not materially increase the burdens of ERISA plan administrators. To determine eligibility for benefits, plan administrators already investigate the marital status of a participant. In *Fox Valley*, the *en banc* Seventh Circuit rejected any notion that its "decision imposes burdensome obligations on plan administrators" and explained that "no such additional burdens will be imposed because, under the ERISA statutory scheme, a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits." *Id.*, 897 F.2d at 282. *Cf. Altobelli*, 77 F.3d at 81.

Enforcing one, simple, uniform, federal common law rule validating divorcing spouses' voluntary, knowing, and express waivers of ERISA pension and welfare benefits replaces chaos with coherence. Plan administrators and courts will not have to study the law of fifty states or the conflicting precedent of federal appellate courts but will, instead, further

ERISA's goals by fostering "nationally uniform plan administration." *Egelhoff,* 532 U.S. at 148.

Even "Plan Documents" judges who rule that voluntary waivers violate ERISA acknowledge that their enforcement would not require plan administrators to do much more work. In *McGowan,* Third Circuit Judge Becker disagreed with Circuit Judge van Antwerpen's concerns about waivers increasing administrative burdens:

> I am not persuaded by this argument. While Congress clearly intended to promote the uniform and efficient operation of plans, I agree with McGowan that the increased burden on the plan in this case would be minimal, particularly in light of the fact that plan administrators must already review external documents to determine whether they qualify as QDROs.

McGowan, 423 F.3d at 254-55. Circuit Judge Becker recognized that nothing "would prohibit us from using our authority to fashion federal common law in this area to develop similarly clear criteria for evaluating purported waivers." *Id.* at 255.

Although administrators would need to make actuarial calculations whenever a beneficiary waived benefits, "administrators already need to make such calculations in the context of QDROs, and indeed in most cases of this genre. These kinds of calculations are *de rigeur* for plan administrators; it is the 'stuff' of their work." *Id.* Continued enforcement of waivers

under federal common law poses little danger of additional administrative effort or expense, despite DuPont's arguments. *McGowan,* 423 F.3d at 254-55 and 259 (Fuentes, J., dissenting and *citing Fox Valley*).

Plans facing disputes about beneficiaries can limit their attorney's fees by filing interpleader actions against competing claimants and depositing funds with courts to disburse to the winning claimant. *Metro. Life Ins. Co. v. Price,* 501 F.3d 271, 276 (3d Cir. 2007); *Metro. Life Ins. Co. v. Bigelow,* 283 F.3d 436, 439-40 (2d Cir. 2002); *Aetna Life Ins. Co. v. Bayona,* 223 F.3d 1030, 1033-34 (9th Cir. 2000); *Rhoades,* 196 F.3d at 595; *Metro. Life Ins. Co. v. Marsh,* 119 F.3d 415, 418 (6th Cir. 1997). The district court stated that "an interpleader action would have been the best and most efficient means for resolving this dispute in the first place." Petition at APP. 26. An interpleader would have enabled the Estate and ex-wife Kennedy to settle or narrow their dispute. DuPont could have avoided incurring significant fees.

Enforcement of ERISA's anti-alienation provision only against alienations and assignments, and not voluntary waivers, best carries out Congress' purposes.

CONCLUSION

Petitioner Kari Ellen Kennedy, Independent Executrix of the Estate of William Patrick Kennedy, Deceased, requests this Court to REVERSE the August 15, 2007 decision of the United States Court of Appeals for the Fifth Circuit and to reinstate the October 5, 2005 judgment of the United States District Court for the Eastern District of Texas.

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RESPONDENT'S BRIEF

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No. 07-636

In the Supreme Court of the United States

KARI ELLEN KENNEDY, PETITIONER,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The Court granted certiorari to review the following question:

Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits under ERISA?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E. I. du Pont de Nemours and Company is a publicly held corporation. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA, 29 U.S.C. §§ 1001 *et seq.*, are set forth in the appendix to this brief.[1]

STATEMENT

Petitioner Kari Ellen Kennedy is the daughter of William and Liv Kennedy and the executrix of her father's estate. William designated Liv as the sole beneficiary of his account in DuPont's 401(k) pension plan. Although William and Liv later divorced, William never changed that designation. Because his designation remained in effect when William died, it was binding on the plan under ERISA, and accordingly the plan paid William's account balance to Liv.

Petitioner contends that Liv waived her right to William's account balance by the terms of her state divorce decree with William. Petitioner therefore asserts that the estate, which was the next beneficiary in line under the plan, rather than Liv, as the designated beneficiary, is entitled to the account balance. Although petitioner brought this suit against the plan under ERISA, the underlying dispute is between the estate and Liv; the plan recognizes its statutory obligation to pay the pension benefits to the rightful beneficiary.

---

[1] Unless otherwise indicated, all statutory citations are to 29 U.S.C.

ERISA's anti-alienation provision prohibits a beneficiary from "assigning" or "alienating" benefits. By this provision, Congress sought to prevent beneficiaries from exchanging their rights to future pension benefits, and hence retirement security, for immediate economic gain. That is precisely what petitioner asserts Liv did here: through the purported waiver in the divorce decree, she gave up her right to William's pension in return for other assets.

Moreover, in the Retirement Equity Act of 1984, Congress amended the anti-alienation provision to address divorce decrees and other "domestic relations orders." 29 U.S.C. § 1056(d)(3)(A), (B)(ii). As amended, the anti-alienation provision prohibits a plan from honoring an assignment or alienation of pension benefits in a domestic relations order such as a divorce decree. However, the Act provides a statutory exception for "*qualified* domestic relations order[s]" ("QDROs"). § 1056(d)(3)(A), (d)(3)(B)(i). To be qualified, a domestic relations order must satisfy specific requirements enumerated in the statute. § 1056(d)(3)(C), (d)(3)(D). The statute prohibits a pension plan from following a domestic relations order that is not a QDRO. § 1056(d)(3)(A), (d)(3)(H)(iii).

Here, it is undisputed that the divorce decree is a non-qualified domestic relations order and that there is no QDRO that applies to the pension benefits at issue in this case. ERISA thus barred the plan from paying benefits in accordance with the purported waiver in the decree.

Although ERISA prohibited the plan from following the non-qualified divorce decree, the statute provides various ways for the parties, if they wished, to prevent Liv from receiving William's account balance. Most directly, William could have changed his beneficiary designation at any time during the seven years between the divorce and his death. In addition, Liv and William could have obtained a qualified domestic relations order specifying a different beneficiary. Finally, outside the divorce context, Liv could have filed a "qualified disclaimer" that would have relinquished her rights under the Plan.

Because none of those steps was taken here, however, William's beneficiary designation remained in effect, and the plan was required to follow that designation and to pay William's account balance to Liv. If the plan had distributed the account balance to petitioner, it would have violated ERISA.

A. ERISA.

1. Employee benefit plans.

In general, there are two types of employee benefit plans covered by ERISA: "welfare plans" and "pension plans." *See* § 1002(3). "[W]elfare plans" provide medical, accident, death, unemployment, vacation and similar benefits. § 1002(1). *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 n.5 (1983). By contrast, "pension plans" provide retirement income. § 1002(2). *See LaRue v. DeWolff, Bobery & Assocs.*, 128 S. Ct. 1020, 1022 n.1 (2008).

ERISA defines a "participant" to mean an "employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." § 1002(7). A "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." § 1002(8).

2. Anti-alienation and QDRO provisions.

ERISA requires that, with respect to pension (but not welfare) plans, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." § 1056(d) ("anti-alienation provision"). The statute does not define those terms, and Treasury has adopted a definition by regulation that provides that "'assignment and alienation' include . . . [a]ny direct or indirect arrangement . . . whereby a party acquires from a . . . beneficiary . . . a plan benefit payment which . . . may become . . . payable to the . . . beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1).

ERISA states that the anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order." § 1056(d)(3)(A). A domestic relations order includes a divorce decree. *See* § 1056(d)(3)(B)(ii) ("'domestic relations order' means any judgment, decree, or order (including approval of a property settlement agreement) which . . . relates to the provision of child support, alimony payments, or marital property rights to a spouse . . . [or] former spouse"). However, as amended by the Retirement Equity Act of 1984 ("REA"), Pub. L.

No. 98-397, 98 Stat. 1426, ERISA excepts from the anti-alienation provision any domestic relations order that is "qualified." § 1056(d)(3)(A) (the anti-alienation provision "shall not apply if the order is determined to be a qualified domestic relations order").

A qualified domestic relations order must satisfy a number of requirements specified in the statute. *See* §§ 1056(d)(3)(B)(i), (C), (D). In brief, to be qualified, a domestic relations order must provide the following information necessary to know what the order requires: (1) the name and address of the participant and each alternate payee; (2) the amount or percentage of the participant's benefit to be paid to each alternate payee; (3) the number of payments or the period to which the order applies; and (4) the plan to which the order applies.

A proposed QDRO is submitted to the pension administrator to determine whether the order satisfies the standards to be a "qualified" domestic relations order. § 1056(d)(3)(G)(i). Each pension plan is required to have "reasonable procedures to determine the qualified status" of such orders. § 1056(d)(3)(G)(ii).

Under ERISA, a pension plan must pay benefits in accordance with a QDRO: "Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." § 1056(d)(3)(A). However, a pension plan may not pay benefits pursuant to a non-qualified domestic relations order. Section 1056(d)(3)(A) provides that the anti-alienation provision "shall apply to . . . any benefit payable . . . pursuant to a domestic relations order [other than a QDRO]." Furthermore, in the case

of a non-qualified domestic relations order, Section 1056(d)(3)(H)(iii) expressly requires a plan to pay benefits as if there were no such order:

> If . . . it is determined that the order is not a qualified domestic relations order, . . . the plan administrator shall pay the . . . [pension benefits] to the person or persons who would have been entitled to such amounts if there had been no order.

Id.

3. Preemption and QDRO provisions.

ERISA also contains a preemption provision that "supersede[s] any and all State laws insofar as they . . . relate to any employee benefit plan." § 1144(a). "'State law' includes all . . . decisions . . . or other State action having the effect of law." § 1144(c)(1).

As it did for the anti-alienation provision, REA amended the preemption provision expressly to exclude QDROs. *See* § 1144(b)(7). Thus, ERISA preempts non-qualified domestic relations orders but not QDROs.

4. ERISA plan documents.

ERISA provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." § 1102(a)(1). In particular, the statute provides that the plan "shall specify the basis on which [benefit] payments are made . . . from the plan." § 1102(b)(4). When acting in a fiduciary capacity, a plan

administrator must "discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan." § 1104(a)(1)(D) (emphasis added).

B. The Present Case.

The following facts are undisputed. *See* Pet. App. 35-36.

1. William's participation in the DuPont pension plan and his marriage to Liv.

a. William Kennedy was employed by DuPont and participated in the company's retirement plans. This case involves what is now called the "Savings and Investment Plan" ("SIP" or "the Plan"), which was formed by the merger of two DuPont pension plans: the "Savings and Investment Plan" and the "Tax Reform Act Stock Ownership Plan" ("TRASOP"). *See* J.A. 28. William also participated in the DuPont "Pension and Retirement Plan" (which is not at issue here).

Under the SIP, a participant "can designate any beneficiary or beneficiaries he chooses to receive all or part" of his SIP account upon his death. J.A. 48. It also states that he "may replace or revoke such designation" at any time. *Id.* The designation of a beneficiary, or a change in a beneficiary designation, must be made "in the manner prescribed by" the Plan. *Id.* at 52. The Plan furnishes forms for the participant to complete and return in order to designate or change a beneficiary. *See id.* at 34, 56-57. Finally, the SIP provides the process for distribution of benefits after the participant's death:

"If no surviving spouse exists and no beneficiary designation is in effect, distribution shall be made to, or in accordance with the directions of, the executor or administrator of the [deceased participant's] estate." J.A. 48.

As required by ERISA's anti-alienation provision, the SIP provides that "no assignment of the rights or interests of account holders under this Plan will be permitted or recognized." J.A. 50-51. However, as authorized by the Internal Revenue Code, the Plan permits a "qualified disclaimer." J.A. 50; SIP § XVI.4(c)(2) (D.I. 40, Ex. D., D0069). This allows a designated beneficiary entitled to benefits as a result of the participant's death to disclaim such benefits; in that event, the benefits are paid directly to the beneficiary next in line under the Plan to receive them.

b. In June 1971, while employed by DuPont, William married Liv Kennedy. In 1974, William designated Liv as his sole beneficiary under the SIP (then called the "Thrift Plan"); he did not designate a contingent beneficiary. In 1980, William similarly designated Liv as his sole beneficiary under the TRASOP and did not designate a contingent beneficiary. Pet. App. 2, 32-33; J.A. 26-28, 34, 56-57.

In 1994, William and Liv were divorced in Texas. Pet. App. 2, 33; J.A. 27. They signed, and the state court entered, a final divorce decree that provided for "a just and right division of the parties' marital estate." Pet. App. 62. The decree identified specific items as each party's "sole and separate property," and stated that the other party "is divested of all right, title, interest

and claim in and to such property." *Id.* at 62, 64. The decree provided that the property awarded to William included the SIP (referred to as the "401k plan"). *Id.* at 64. Petitioner contends that these provisions constitute a waiver of Liv's right, as the designated beneficiary, to receive benefits under the SIP following William's death.

The property awarded to Liv in the divorce included a portion of William's retirement benefits under the Pension and Retirement Plan (which is not at issue here). The parties requested, and the court granted, a QDRO confirming Liv's interest in that plan. In 1997, that QDRO was amended. No QDRO was ever sought or entered for the SIP. Pet. App. , 33, 53; J.A. 27.

Several days after entry of the divorce decree, William executed a new beneficiary-designation form to make his daughter, Kari, the beneficiary of the portion of the retirement benefits that William retained under the Pension and Retirement Plan. J.A. 62. This change did not apply to the SIP.

William retired from DuPont in 1998 and passed away in 2001. During the seven years between the divorce in 1994 and his death in 2001, William never submitted a form to change his designation of Liv as his beneficiary under the SIP. Accordingly, Liv remained William's designated SIP beneficiary at the time of his death. Pet. App. 3, 33, 53; J.A. 28.

Following William's death, petitioner qualified as the executrix of his estate. Pet. App. 3, 33. She demanded payment of the balance in William's SIP account on the

ground that Liv had waived her right to that account in the divorce decree and the estate was the next beneficiary in line under the Plan. When the Plan declined that demand and paid the benefits to Liv as the designated beneficiary, petitioner brought this action against the Plan, *inter alia*, to recover the benefits under ERISA. Pet. App. 3, 33; J.A. 29.

2. The decisions below.

a. On cross-motions for summary judgment, the district court granted judgment to petitioner and denied it to respondents. Pet. App. 31-52. The court held that the effectiveness of Liv's waiver under ERISA is governed by federal common law rather than by the statute itself, relying on a line of Fifth Circuit decisions that applied federal common law to purported waivers of ERISA benefits under welfare (not pension) plans.

b. On respondents' appeal, the Fifth Circuit unanimously vacated that ruling and rendered judgment for respondents. Pet. App. 1-14. The panel distinguished the circuit precedent cited by the district court on the ground that those decisions involved welfare plans (to which ERISA's anti-alienation provision does not apply) rather than pension plans. *Id.* at 5-7. The court then held that federal common law was inapplicable because the case was controlled by the anti-alienation provision and the QDRO provision, which is the "sole exception" to anti-alienation in the marital-dissolution context. *Id.* at 7-11. Finally, relying on the applicable Treasury regulation, it rejected petitioner's argument that a purported waiver in a divorce decree is not an assignment or alienation for purposes of the anti-alienation provision. *Id.* at 8.

SUMMARY OF ARGUMENT

1. Three provisions of ERISA bar a plan from following a purported waiver of pension benefits in a non-qualified domestic relations order. First, the anti-alienation and QDRO provisions prohibit any arrangement that constitutes an "assignment" or "alienation" of the beneficiary's pension benefits to another party. Second, the QDRO provision requires a plan to disregard a non-qualified order and to pay benefits as if there were no such order. Third, ERISA preempts a non-qualified domestic relations order. Accordingly, the statute on its face precludes a plan from following a purported waiver in a non-qualified divorce decree. Because the statute is clear and leaves no gap, there is no room for the creation of federal common law.

a. As the Fifth Circuit correctly held, the anti-alienation and QDRO provisions prohibited the Plan from recognizing Liv's purported waiver in a divorce decree that is not a QDRO. Under the applicable Treasury regulation, the purported waiver constitutes an "assignment" or "alienation," which is defined to "include . . . [a]ny direct or indirect arrangement . . . whereby a party acquires from a . . . beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which . . . may become . . . payable to the . . . beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii). Because recognizing Liv's waiver would result in the next beneficiary in line under the Plan acquiring Liv's interest, the Plan was barred from honoring the purported waiver.

b. Even if Liv's purported waiver in the non-qualified divorce decree was not an "assignment" or "alienation," the Plan still was barred from following it. The QDRO provision explicitly requires that if a plan determines that an order is not a QDRO, it "shall pay" benefits as "if there had been no order." § 1056(d)(3)(H)(iii). Because Liv's purported waiver was set forth in a divorce decree that was not a QDRO, the Plan could not recognize it and was required to pay the SIP death benefits to Liv.

c. ERISA preempts non-qualified domestic relations orders. ERISA's preemption provision sets forth an exception for QDROs but not for non-qualified orders. Accordingly, the purported waiver included in the Kennedys' non-qualified divorce decree was preempted.

2. As the United States agrees, ERISA's "plan documents" requirement mandates that benefits be paid in accordance with the terms of the plan. This requirement is critical to the efficient and practicable administration of benefit plans.

Here, the SIP provides that, absent a QDRO, benefits will be paid to the beneficiary designated by the participant on a plan form. That person was Liv, and William never changed his designation – as he had the right to do – by submitting a form at any time during the seven-year period between the divorce and his death. Accordingly, the Plan properly paid benefits to Liv as William's designated beneficiary.

ARGUMENT

ERISA PROHIBITS A PLAN FROM PAYING PENSION BENEFITS BASED ON A PURPORTED WAIVER IN A DIVORCE DECREE THAT IS NOT A QDRO.

I. A PENSION PLAN MAY NOT RECOGNIZE A PURPORTED WAIVER IN A DIVORCE DECREE THAT IS NOT A QDRO.

A. The Anti-Alienation And QDRO Provisions Bar Recognition Of A Purported Waiver In A Non-Qualified Divorce Decree.

The Fifth Circuit reached the correct result for the correct reason. As the court held, Liv's purported waiver in the divorce decree constitutes an "assignment" or "alienation" under ERISA. Because the decree is not a QDRO, the anti-alienation provision prohibited the Plan from recognizing it. Moreover, because there is no gap in the statute, petitioner's argument that courts should create federal common law is unavailing.

1. Because Liv's purported waiver in the divorce decree is an assignment or alienation, the anti-alienation provision applies.

ERISA's anti-alienation provision states that "benefits provided under [an ERISA-governed pension] plan may not be assigned or alienated." § 1056(d)(1). Petitioner, now joined by the United States, contends that the purported waiver of pension benefits in a non-

qualified divorce decree is not subject to the anti-alienation provision. Under the applicable Treasury regulation, however, Liv's purported waiver in the divorce decree constitutes a prohibited "assignment" or "alienation" because it is a "direct or indirect arrangement . . . whereby a party acquires from a . . . beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which . . . may become . . . payable to the . . . beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii). For this reason, ERISA barred the Plan from recognizing the purported waiver.

a. ***Liv's purported waiver is an "assignment" or "alienation" subject to the anti-alienation provision.***

i. ***The statute and regulation establish that Liv's purported waiver is an "assignment" or "alienation."***

(a) If arguendo an assignment requires a transfer to a third-party, the divorce decree here satisfies that requirement.

Petitioner and the United States contend (Pet. Br. 18-19; U.S. Am. Br. 11-13) that an assignment requires a transfer to a third party. Even if ERISA required a third-party transfer – which it does not (*see* pages 17-19, *infra*) – the purported waiver in the Kennedys' non-qualified decree satisfies any such requirement.

According to petitioner and the government, Liv's agreement constituted a "waiver without more" or a "bare waiver" of William's pension benefit because Liv's

rights were renounced without being transferred to someone else. *See* U.S. Am. Br. 10-11, 14, 19-22. But that is not so. If William had passed away at the instant the divorce decree became effective, the right to the pension benefit automatically would have gone to the beneficiary next in line under the Plan. That is a sufficient third-party transfer to constitute an assignment. *See* Pet. App. 8-9.

Although the statute does not define the terms "assign[ment]" or "alienat[ion]," the applicable Treasury regulation provides that they "include"

> [a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

26 C.F.R. § 1.401(a)–13(c)(1)(ii).

The Fifth Circuit correctly recognized (Pet. App. 8-9) that Liv's purported waiver amounts to an "indirect arrangement" within the definition of "assignment or alienation" in the Treasury regulation. The court agreed with Judge Easterbrook that "[w]aiver [in the ERISA context] is an anticipatory gift, to whoever is next in line under the Fund's rules." Pet. App. 9, quoting *Fox Valley & Vicinity Constr. Workers Pension Plan v. Brown*, 897 F.2d 275, 282-83 (7th Cir.) (en banc) (Easterbrook, J., dissenting) (bracketed material added by court), *cert. denied*, 498 U.S. 820 (1990). *See also*

McGowan v. NJR Serv. Corp., 423 F.3d 241, 249 (3d Cir. 2005) (same), *cert. denied*, 127 S. Ct. 1118 (2007). Thus, the purported waiver in the decree is an "assignment" or "alienation" – to the beneficiary next in line – within the plain meaning of the regulation.[2]

Here, because William did not designate a contingent beneficiary, his account balance would have gone to his estate as the beneficiary next in line under the default provision of the Plan. *See* § 1002(8), (9); Pet. App. 8-9; J.A. 48. That would meet any requirement of a third-party transfer. Furthermore, by way of illustration, William was free to designate a contingent beneficiary of his choice and could have selected a third party such as his daughter, Kari. Alternatively, the Plan might have had a different default provision to designate, for example, the participant's child. This demonstrates that a purported waiver in a divorce decree constitutes an "indirect arrangement" that involves a transfer to a third party.

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[2] Moreover, as Judge Becker observed in *McGowan*, in many instances the purported waiver specifically serves to enable the participant to give the benefits to a third party (such as a new spouse). *See* 423 F.3d at 251 (Becker, J., concurring). This further confirms that the purported waiver is an "indirect arrangement" for a transfer to a third party that is prohibited by the anti-alienation provision.

(b) ERISA's anti-alienation provision applies to a divorce decree regardless of whether there is a transfer to a third party.

The linchpin of the position of petitioner and the United States is that there is no assignment unless the assigning party transfers the benefit in question to a third party. ERISA imposes no such requirement.

In enacting the QDRO provision, Congress understood that the anti-alienation prohibition would apply to divorce decrees. Indeed, the statutory definition of "domestic relations order" is "any judgment, decree, or order (including approval of a property settlement agreement) which . . . relates to the provision of . . . marital property rights to a spouse [or] former spouse." § 1056(d)(3)(B)(ii). Nothing in this definition restricts domestic relations orders to situations involving third parties. On the contrary, the broad and unrestricted definition, coupled with the fact that divorce decrees often involve only the divorcing parties and their rights *inter se*, indicates that the anti-alienation provision applies regardless of whether the divorce decree requires a transfer to a third party. If Congress had intended to exclude two-party transfers from the anti-alienation provision, it would not have included transfers of pension benefits between ex-spouses in the QDRO exception.

Treasury's own regulation accords with this analysis. *See* 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (quoted at page 15, *supra*). The regulation does not refer to a third party or require that the waiving spouse affirmatively transfer

her interest in the pension benefit to a third party. Rather, it requires, in the passive voice, only that "a party acquire[ ] from a . . . beneficiary a right or interest enforceable against the plan in . . . any part of a plan benefit payment which . . . may become . . . payable to the beneficiary." Accordingly, the government misreads the unambiguous text of the regulation in arguing that the waiver itself must "*direct* an interest from the beneficiary to any other individual." U.S. Am. Br. 19 (emphasis in original).

The government asserts that the anti-alienation provision is not applicable if the waiving spouse's interest "reverts to the [plan] participant." U.S. Am. Br. 12, 14, 19. This is incorrect. To begin with, it has no relevance to this case because a death benefit cannot revert to the participant.

Furthermore, the Treasury regulation does not refer to – let alone exclude – reversions. Quite the opposite, the regulation on its face is broad enough to encompass a reversion. Calling the transfer a reversion does not alter the reality that a property settlement in a divorce involves the waiving spouse's purported exchange of her interest in the pension benefit to the participant spouse in return for other assets, and that constitutes an "assignment" or "alienation." As Judge Becker explained:

> Rosemary's waiver was more than a renunciation of her right to benefits under the plan; rather, it was an attempt to transfer her interest in the plan to McGowan . . . . *[N]othing in the anti-alienation provision*

> . . . *excepts transfers from plan beneficiaries to plan participants* . . . . The purported waiver in this case fits squarely within the definition of assignment or alienation as an "indirect arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan."

McGowan, 423 F.3d at 251 (Becker, J., concurring).

(c) The government's position in its amicus brief is not entitled to controlling deference.

The United States asserts that the position taken in its *amicus* brief is entitled to "controlling" deference as a "reasonable interpretation" of Treasury's anti-alienation regulation under *Auer v. Robbins*, 519 U.S. 452, 462 (1997). *See* U.S. Am. Br. 20.

The Court need not address the deference issue. The preceding arguments demonstrate that the government's brief is inconsistent with the statute and the plain language of the regulation. Such positions do not warrant deference. *See Auer*, 519 U.S. at 461; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-49 (1987).

If the Court reaches the issue, the government's *amicus* brief is not entitled to controlling deference under *Auer*:

- The key phrase in the regulation on which the government relies is "assignment and alienation." The government, however, neither claims nor has "expertise and experience" to interpret those legal terms. *Gonzales*

v. Oregon, 546 U.S. 243, 757 (2006). Instead, the government's brief largely consists of legal analysis of the meaning of those words at common law; such legal arguments have no right to controlling deference. *See Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292-93 (10th Cir. 1978) ("[w]hen the administrative interpretation is not based on expertise in the particular field, however, but is based on general common law principles, great deference is not required").

• Because the crucial phrase "assignment and alienation" in the regulation is taken directly from the statute, it "does little more than restate the terms of the statute itself," and such "parroting" is not entitled to controlling deference under *Auer*. *See Gonzales*, 546 U.S. at 257. *See also Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361, 2370 (2008).

• The regulation does go beyond the statute in its express recognition that "indirect" as well as "direct" arrangements are prohibited by the anti-alienation provision. As the *amicus* brief makes clear, however, it is the "assignment and alienation" language, not the "indirect arrangement" phrase, on which the government rests its position. Indeed, as explained above, the government's position ignores the critical words "direct or indirect."

• As the government itself acknowledges, its *amicus* brief in this case is inconsistent with the position it took in *Keen v. Weaver*, 121 S.W.3d 721 (Tex.), *cert. denied*, 540 U.S. 1047 (2003). Controlling deference is not due if the interpretation does not represent a "consistent view" and was "contrary to the . . . view . . .

advocated in past cases." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). *See also Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515 (1994).[3]

(d) The purported waiver in the divorce decree is not a valid disclaimer.

The government's submission appears in large part to be an attempt to protect disclaimers under the Internal Revenue Code from any adverse consequences if the Court affirms the anti-alienation holding of the Fifth Circuit. This case, however, will not affect such disclaimers.

As the United States explains (U.S. Am. Br. 16-17), an Internal Revenue Service General Counsel Memorandum has concluded that the anti-alienation provision does not apply to a disclaimer that meets the requirements of state law and Section 2518(b) of the Internal Revenue Code, and the Code and Treasury regulations provide for the disclaimer of benefits for tax purposes. *See* I.R.S. Gen. Couns. Mem. 39,858, 1991 WL 776304 (Sept. 23, 1991); 26 U.S.C. § 2518; 26 C.F.R.

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[3] The *amicus* brief also is inconsistent with the position taken by the government in the Supreme Court of Washington on remand from this Court in *In re Estate of Egelhoff*, No. 67626-7 (Wash. 2001). There, the government acknowledged both that (1) "[i]f a domestic relations order fails to meet these specific requirements [for a QDRO], the plan may not honor the order's directions without violating ERISA's anti-alienation prohibitions," and (2) "waiver of pension benefits is generally impermissible under the statute." Brief of the Sec'y of Labor as *Amicus Curiae* at 4-5.

§ 1.401(a)(9)–4, Q&A 4. This conclusion reflects the longstanding and common-sense proposition that "[t]he law is certainly not so absurd as to force a man to take an estate against his will." John H. Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. CHI. L. REV. 316, 316 (1979), quoting *Towson v. Tickell*, 106 Eng. Rep. 575, 576-77 (K.B. 1819).

The Solicitor General emphasizes that a valid disclaimer is not subject to the anti-alienation provision. Respondents agree that the disclaimer addressed by the General Counsel Memorandum would not violate the anti-alienation provision. However, the purported waiver in this case would not qualify as a disclaimer.

Under both tax and common law, a disclaimer is valid only if it puts the disclaimant in the same position she would have been if she had not received any interest in the benefit. In particular, the disclaimant must receive nothing in return for the putative disclaimer.[4] If the disclaimant receives consideration in exchange for the disclaimer, her position is different from what it would have been if she never had a right to the benefit being disclaimed, and the disclaimer would constitute an alienation. *See* 26 U.S.C. § 2518(b)(3); 26 C.F.R. § 25.2518-2(d)(1).

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[4] *Roseberry v. Moncure* 429 S.E.2d 4, 6 (Va. 1993); *Smith v. Bank of Del.*, 219 A.2d 576, 577 (Del. 1966); *Preminger v. Union Bank & Trust Co.*, 220 N.W.2d 795, 798-99 (Mich. Ct. App. 1974); 4 William L. Fratcher & Austin W. Scott, THE LAW OF TRUSTS § 337.1 (4th ed. 1989); RESTATEMENT (SECOND) OF TRUSTS § 36, cmt. c (1959).

A purported waiver in a divorce decree cannot be a qualified disclaimer because the disclaimant is not left in the same position she would have been in if she never had a right to the benefit being disclaimed. Not only is the divorce itself consideration for the purported disclaimer, but a disclaimer of pension plan benefits as part of a divorce property settlement invariably involves an exchange for other assets.[5] And, of course, Liv never characterized or couched her purported waiver as a disclaimer under the Code. Accordingly, the divorce decree cannot be treated as a valid disclaimer, and rejecting petitioner's claim for benefits would not cause a valid disclaimer under the tax code to violate the anti-alienation provision.

ii. *The purpose and history of the anti-alienation provision confirm that Liv's purported waiver is prohibited under ERISA.*

The purpose and legislative history of the anti-alienation provision confirm that a pension plan cannot recognize a purported waiver of pension benefits in a

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[5] *See, e.g., Clay v. Clay*, No. 06 BE 40, 2007 WL 2582211, at *4 (Ohio Ct. App. 7th Dist. Sept. 7, 2007) (divorce decree may "designat[e] other marital assets to offset the value of the pension, or [require] one party to pay the equivalent value of those benefits or assets to the other party"); 2 Grace Gans Blumberg, *et al.*, VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 23.02[4][c] (2008) (court may award entire pension to participant and award "offsetting assets" to other spouse); Anne E. Moss, YOUR PENSION RIGHTS AT DIVORCE: WHAT WOMEN NEED TO KNOW 40 (2d ed. 1995) (wife may receive "a share of the pension or other property in exchange for the pension").

non-qualified divorce decree. As this Court has recognized, the anti-alienation provision "'bespeak[s] a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement.'" *Boggs v. Boggs*, 520 U.S. 833, 851 (1997) (citation omitted).

The legislative history reflects this congressional policy. As originally enacted in 1974, the anti-alienation provision was designed to ensure that pension "benefits are actually available for retirement purposes." H.R. Rep. No. 93-779, at 66, (1974); H.R. Rep. No. 93-807, at 68 (1974). Congress fully adhered to this policy in enacting the QDRO provision in REA. Indeed, it had a broad understanding of the anti-alienation prohibition: "ERISA prohibits pension benefits from being assigned or alienated (*i.e., giving away rights to future pension benefits*)." H.R. Rep. No. 98-655 (pt. 1), at 30 (1984) (emphasis added).

Thus, Congress intended the anti-alienation provision to prevent a participant or beneficiary from trading future pension benefits for an immediate advantage or gain. This case falls squarely within that congressional proscription: Liv's purported waiver in the non-qualified divorce decree gave her the present benefits of the property specified in the decree in exchange for her interest in future pension benefits.

iii. *The more persuasive lower-court decisions hold that ERISA prohibits pension-benefit waivers in non-qualified divorce decrees.*

The more recent and better reasoned decisions of the courts of appeals support respondents' position that the purported waiver of pension benefits in a non-qualified divorce decree is barred by the anti-alienation provision. The panel below unanimously so held, distinguishing its prior decisions (many of which petitioner continues to cite in this Court) involving insurance benefits on the ground that the anti-alienation provision does not apply to such welfare plans. The Third Circuit reached the same conclusion in *McGowan*, 423 F.3d at 248-50; *id.* at 251-53 (Becker, J., concurring).

The leading decision rejecting this anti-alienation argument is *Fox Valley*, which was followed in *Estate of Altobelli v. International Bus. Machines Corp.*, 77 F.3d 78 (4th Cir. 1996).[6] This line of decisions rests on two predicates that are incorrect as a matter of law.

First, these decisions reason that the anti-alienation provision applies only to participants and not to beneficiaries. *See Fox Valley*, 897 F.2d at 279; *Altobelli*, 77 F.3d at 81. That ruling is not supported by § 206(d), which applies without limitation to any assignment or alienation. Nor is it supported by the relevant Treasury regulation, which, contrary to those courts' analysis,

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[6] *See also Strong v. Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320 (Neb. 2005); *Keen v. Weaver*, *supra*; *Silber v. Silber*, 786 N.E.2d 1263 (N.Y.), *cert. denied*, 540 U.S. 817 (2003).

expressly refers to both "beneficiar[ies]" and "participant[s]." *See* 26 C.F.R. § 1.401(a)-13(c)(1)(ii).

Furthermore, these decisions cannot be squared with the decisions of this Court. *Boggs*, after summarizing the Court's earlier opinions that ERISA generally protects beneficiaries as well as participants (520 U.S. at 845), held that the anti-alienation provision applies to both "participants and beneficiaries." *Id.* at 852. *See also id.* at 864 (Breyer, J., dissenting). Thus, as all three judges in *McGowan* agreed, *Boggs* rejects the reasoning of *Fox Valley*. *See* 423 F.3d at 248, 253 (Becker, J., concurring), 258 (Fuentes, J., dissenting).[7]

Second, the *Fox Valley* line of cases holds that a purported waiver of pension benefits in a non-qualified divorce decree is not an "assign[ment]" and therefore is not subject to the anti-alienation provision. *See Fox Valley*, 897 F.2d at 279-80; *Altobelli*, 77 F.3d at 81. As demonstrated above, that conclusion is wrong and was correctly rejected by the Fifth Circuit in this case and the Third Circuit in *McGowan*.[8]

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[7] Petitioner contends (Pet. Br. 37-38) that the Seventh Circuit adhered to *Fox Valley* subsequent to *Boggs* in *Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003). *Melton*, however, involved a welfare rather than a pension plan, and therefore the anti-alienation provision was not at issue.

[8] Moreover, those cases did not consider the additional arguments presented at pages 47-52, *infra*.

b. ***In the context of marital dissolution, a QDRO is the only valid way under ERISA that a divorcing spouse can relinquish pension benefits for which she is the designated beneficiary.***

As shown above, ERISA's anti-alienation and QDRO provisions prohibit a pension plan from recognizing a purported waiver of pension benefits in a non-qualified divorce decree. Where a divorcing spouse has been designated by her spouse as his beneficiary under a pension plan in which he participates, she can give up those rights in the divorce proceeding only by means of a valid QDRO. Thus, the Fifth Circuit correctly held that "[i]n the marital-dissolution context, the QDRO provisions supply the *sole* exception to the anti-alienation provision." Pet. App. 10 (emphasis in original). *See also Hamilton v. Washington State Plumbing & Pipefitting Indus. Pension Plan*, 423 F.3d 1091, 1099 (9th Cir.) (QDRO "is the exclusive override method, not merely illustrative"; rejecting argument that QDRO exception is not "exhaustive[ ]" but only "exemplifies one particular scenario"), *cert. denied*, 127 S. Ct. 86 (2006); *McGowan*, 423 F.3d at 250 ("Congress provided only one option to individuals in McGowan's position"); *id.* at 251-52 (Becker, J., concurring) ("Congress saw QDROs as the only means by which a participant or beneficiary could alienate his or her interest in the plan"); *Fox Valley*, 897 F.2d at 279 (QDRO constitutes the "only" exception where the anti-alienation provision is applicable).

To say that a QDRO was the only way Liv could relinquish her rights to the pension benefits in a divorce decree, however, does not mean that there were not other ways for the parties to achieve that objective if they desired. As stressed in the *amicus* briefs of the United States and AARP, William could have eliminated Liv's right to a death benefit under the SIP simply by submitting a beneficiary-designation form to the Plan at any time during the seven years between the divorce and his death – as in fact he did with respect to benefits under another DuPont plan (*see* page 9, *supra*), but not for the SIP.

Likewise, in contexts other than marital dissolution, Liv herself could have elected to forgo the pension benefit. As explained above, the anti-alienation provision does not bar a qualified "disclaimer," but a purported disclaimer is not qualified where, as in divorce cases, it is given in return for consideration. *See* pages 22-23, *supra*.

i. ***ERISA's text and legislative history establish that a QDRO is the exclusive exception to the anti-alienation provision in divorce cases.***

As amended by REA, ERISA provides an express exception to the anti-alienation provision in the context of marital dissolution for a "qualified domestic relation order": "[The anti-alienation provision] shall apply . . . to a domestic relations order, except that [it] shall not apply if the order is determined to be a qualified domestic relations order." § 1056(d)(3)(A). A QDRO is

the only exception recognized by the statute in the context of divorce.

The anti-alienation provision makes plain that a plan administrator *must* pay pension benefits in accordance with a QDRO but *may not* pay them pursuant to a non-qualified divorce decree. Section 1056(d)(3)(A) expressly states that "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." Thus, a plan administrator is obligated to pay pension benefits in compliance with a valid QDRO.

By contrast, the preceding sentence in § 1056(d)(3)(A) explicitly directs that the anti-alienation provision "shall apply to . . . any benefit payable . . . *pursuant to a domestic relations order, except that [it] shall not apply if the order is determined to be a qualified domestic relations order*" (emphasis added). Moreover, Section 1056(d)(3)(H)(iii)(I) states that "[i]f it is determined that the order is not a qualified domestic relations order, . . . the plan administrator *shall pay* the . . . [benefits] to the person or persons who would have been entitled to such amounts *if there had been no order*" (emphasis added). Hence, the anti-alienation and QDRO provisions prohibit payment of pension benefits pursuant to a divorce decree that is not a QDRO.

The legislative history confirms that the statute means what it says. The history underscores Congress's awareness that the QDRO provision embodies "[s]pecial [r]ules in [d]ivorce, etc. [p]roceedings." H.R. Rep. No. 98-655 (pt. 1), at 39. As the Senate Report unambiguously states, the anti-alienation provision was

"clarified by creating *a limited exception* that permits benefits under a pension, etc., plan to be divided *under certain circumstances*. In order to provide rational rules to plan administrators, the Committee believe[d] it [was] necessary to establish guidelines for determining whether *the exception* to the spendthrift rules applies." S. Rep. No. 98-575, at 19 (1984) (emphasis added). Tellingly, the Report explains in unmistakable terms that the distribution of pension benefits in a divorce decree "is not considered an assignment or alienation of benefits under the plan *if and only if the order is a qualified domestic relations order*." *Id.* (emphasis added). The House Report is to the same effect: "the bill makes clear that the orders [in a divorce case] *have to meet* specific requirements [of a QDRO] if they are to be honored by the plan." H.R. Rep. No. 98-655 (pt. 1), at 39 (emphasis added).

Furthermore, the legislative history also makes clear that Congress purposely confined the exception to the anti-alienation provision to QDROs in order to limit the burden on plan administrators and ensure the practical workability of pension plans. By "mak[ing] clear that the [domestic relations] orders have to meet specific requirements if they are to be honored by the plan," Congress explicitly sought to "minimize the burden on the plan and eliminate any confusion over what the court is ordering." H.R. Rep. No. 98-655 (pt. 1), at 39. Thus, while Congress wanted to increase pension protections, "[i]mportantly, we want to achieve these aims *without imposing unnecessary or unreasonable costs o[n] pension plans*." *Id.* at 25 (emphasis added). Because the specific statutory criteria for QDROs ensure that the proposed order submitted to the plan administrator

provides on its face the necessary information for the administrator to determine whether it is qualified (*see* page 5, *supra*, and page 57-58, *infra*), QDROs are much easier for plan administrators to process and thus avoid the difficulties and burdens associated with non-qualified orders.

> The general goals of ERISA are served . . . [by the QDRO provision] because a divorce decree meeting the requirements contained in section 1056(d) provides all the necessary information to determine the identity of a beneficiary without creating unreasonable administrative burdens for the plan administrator.

Carland v. Metropolitan Life Ins. Co., 935 F.2d 1114, 1120 (10th Cir.), *cert. denied*, 502 U.S. 1020 (1991). *See also, e.g., Hamilton*, 433 F.3d 1096-97.

As Congress understood, efficiency and administrability are critical to the sound operation of the pension system. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 149 n.3 (2001) (referring to ERISA's central "objective of efficient plan administration"). Plan administrators typically are not lawyers, and the pension system could not effectively operate if advice of counsel routinely had to be sought to process claims. *See Boggs*, 520 U.S. at 853 ("Congress could not have intended that pension benefits from pension plans would be given to accountants and attorneys" to administer). Furthermore, the need for efficiency and simplicity is underscored by the fact that "[p]ension plans are high-volume operations." *Blue v. UAL Corp.*, 160 F.3d 383, 386 (7th Cir. 1998). Accordingly, Congress predicated

ERISA on "unyielding rules" rather than "flexible standards" in order to "yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules." *Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting).

Non-qualified orders present a problem similar to that in *Egelhoff*. Such orders are entered by courts across the country based upon state law. They may include terms of art under state law or otherwise reflect state-law principles and requirements. Unlike QDROs, non-qualified orders are not required to adhere to prescribed, uniform standards. The administrator of a plan covering employees and retirees living in various states across the country has no feasible way to analyze such divergent orders. *See Egelhoff*, 532 U.S. at 148, 149-50 (variant state law "interferes with nationally uniform plan administration" and "undermine[s] the congressional goal of 'minimiz[ing] the administration and financial burden[s]' on plan administrators") (citation omitted).

This case illustrates these difficulties. Although petitioner contends that the divorce decree "waived" Liv's pension benefits, that word nowhere appears in the decree; rather, it uses the term "divested." It would be impossible for an administrator to divine accurately the meaning to ascribe to that choice of language. Furthermore, while the divorce awarded the SIP account to William, it did not say anything that would have precluded him from maintaining Liv as his beneficiary. *See Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693-94 (8th Cir. 1989) (divorce decree providing that

ex-husband "shall have as his own, free and clear of any interest of [his ex-wife], the interest in the profit-sharing plan," did not waive ex-wife's right to death benefits because the decree did not "specifically refer to and modify the beneficiary interest"). Thus, even after a time-consuming and costly process to attempt to interpret the divorce decree, the Plan would be left to speculate what the decree means.

By contrast, the QDRO provision provides an orderly and consistent framework for plan administrators. When a proposed QDRO is submitted to the administrator, it can be compared to the detailed requirements specified in the statute. This process enables administrators to identify and discuss with the parties any deficiencies or ambiguities that need to be corrected for the order to be qualified; in practice, many proposed orders are initially defective, and discussions occur to remedy those problems. All of this takes place without the expense, delay, and uncertainty of litigation.

Petitioner asserts, however, that for two reasons "ERISA's QDRO provision does not bar non-QDRO waivers of ERISA benefits." Pet. Br. 25. First, she contends that the QDRO provision is merely a "safe harbor" (*id.* at 25, 30) that, while "[s]erv[ing] as *one* exception to ERISA's general prohibition on alienation or assignment of benefits" (*id.* at 26 (emphasis in original)), permits other exceptions not contained in the statute.

ERISA cannot reasonably be read to mean that the carefully enacted and detailed QDRO provision is merely illustrative and leaves open, without so much as a mention in the text or history, alternative extra-statutory exceptions

to the general anti-alienation prohibition. Indeed, the statute and history refute petitioner's position. As explained above, the QDRO provision states not only that the anti-alienation prohibition "shall apply" to a domestic relations order that is not a QDRO, but also that, if an order is not a QDRO, "the plan administrator *shall pay . . . [the benefits] to the person or persons who would have been entitled to such amounts if there had been no order*" (emphasis added). Likewise, Congress clearly indicated that QDRO provides "a *limited exception* . . . under certain circumstances"; that divorce decrees "*have to meet* specific requirements [of a QDRO] if they are to be honored by the plan"; and that a division of pension benefits in a divorce decree is "not considered an assignment or alienation under the plan *if and only if the order is a qualified domestic relations order*" (emphasis added). ERISA thus forecloses the availability of non-statutory exceptions to the anti-alienation provision beyond the express QDRO exception Congress adopted.

Second, petitioner argues that the QDRO provision will not bear this meaning because it merely "'*clarifies* that such order does not result in a prohibited assignment or alienation of benefits under the spendthrift provisions of the Code or ERISA.'" Pet. Br. 29, quoting S. Rep. No. 98-575, at 3 (emphasis added by petitioner). But the word "clarifies" does not support petitioner's position.

In enacting REA, Congress recognized that "[t]he courts [were] divided on the question of whether [ERISA's] anti-assignment clause applies to State domestic relations orders." H.R. Rep. No. 98-655

(pt. 1), at 30. Congress resolved that conflict by adopting an express exception for QDROs but not for non-qualified orders. In this way, Congress "*clarified . . . [the law] by enacting a limited exception* that permits benefits under a pension plan . . . to be divided under certain circumstances [specified in the QDRO provision]." S. Rep. No. 98-575, at 19 (emphasis added). *See also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988) (because "Congress thought that some courts had erroneously construed [the statute], . . . the 1984 amendment served the purpose of correcting the error, thus clarifying the original meaning of [the statute]").[9]

Thus, petitioner is incorrect that the QDRO amendment was simply a non-substantive or insignificant "clarification."

ii. *Courts cannot create common law where Congress has addressed the issue in the statute.*

Because ERISA addresses the issue of purported waivers of pension benefits in divorce decrees and prohibits them absent a QDRO, petitioner's argument that federal common law permits a waiver contained in a non-qualified order is meritless. There is no basis for federal courts to create an exception to anti-alienation for non-qualified domestic relations orders.

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[9] Petitioner relies (Pet. Br. 29-30) on pre-REA cases, but Congress rejected those decisions in adopting the QDRO approach. *See Fox Valley*, 897 F.3d at 278-79; *Silber*, 786 N.E.2d at 1267.

As this Court has explained, "ERISA is . . . a 'comprehensive and reticulated statute' " *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993), quoting *Nachman v. PBGC*, 446 U.S. 359, 361 (1980). Where an explicit provision of ERISA addresses an issue, the Court has been unwilling to read additional terms into the statute. *See, e.g., Harris Trust & Serv. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000); *Mertens*, 508 U.S. at 254; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

These principles are fully applicable here. "[T]his Court itself vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, *declining to recognize any implied exceptions to the broad statutory bar.*" *Patterson v. Shumate*, 504 U.S. 753, 760 (1992) (emphasis added). Section 1056(d) "reflects a considered congressional policy choice," and "courts should be loath to announce . . . exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 376 (1990). Thus, the QDRO exception to the anti-alienation provision "is not subject to judicial expansion" or "amenable to . . . sweeping extratextual extension." *Boggs*, 520 U.S. at 850-51. "If exceptions to this policy are to be made, it is for Congress to undertake that task" – as indeed Congress did in REA where it "mandated that the anti-alienation provision should not apply to a 'qualified domestic relations order.'" *Guidry*, 493 U.S. at 376 & n.18.

Federal common law provides no basis for the courts to create legal rules that are inconsistent with the statutory enactments of Congress. As in other areas, federal common law under ERISA is appropriate only to "fill . . . [a] gap" in the statute. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989). *See also Yates v. Hendon*, 541 U.S. 1, 16 & n.5 (2004). "Federal common law is a 'necessary expedient' " where the courts are "compelled to consider federal questions 'which cannot be answered from federal statutes alone.' . . . [W]hen Congress addresses a question . . . the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (citation omitted). In no event is "[t]he authority of courts to develop a 'federal common law' under ERISA . . . the authority to revise the text of the statute." *Mertens*, 508 U.S. at 259.

Petitioner's argument runs afoul of these governing principles. She asks the Court to create a new ERISA concept – a waiver of pension benefits in a divorce decree that is not a QDRO – even though ERISA's anti-alienation and QDRO provisions provide that a plan *cannot* follow a non-qualified domestic relations order. Thus, the statute leaves no gap on this issue that federal common law may appropriately fill in.[10]

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[10] In addition, as the United States demonstrates, courts recognizing the validity of common-law waiver have come to quite different results regarding what language in a decree constitutes an effective waiver, often reaching opposite conclusions on indistinguishable language. *See* U.S. Am. Br. 27 n.9. This is directly contrary to Congress's design that ERISA plans be administered on a uniform nationwide basis. *See Egelhoff*, 532 U.S. at 148.

Faced with these settled principles, petitioner resorts to three arguments. First, she contends (Pet. Br. 43) that the Court should create a federal common law of waiver in non-qualified divorce decrees in order to effectuate the assumed intent of the divorcing parties. Contrary to petitioner's assumption (*id.* at 58-59), however, there is no way to determine the intent of the parties without litigation. Indeed, ex-spouses can remain on good terms following a divorce, and the plan participant might not have changed the beneficiary designation because he wanted the ex-spouse to receive the benefits even after the divorce. *See Keen v. Weaver*, 121 S.W.2d at 732-33 (Hecht, J., dissenting); U.S. Am. Br. 9; AARP Am. Br. 15.[11]

A central purpose of the QDRO provision is to facilitate payment of pension benefits without the delay, expense, and uncertainty caused by highly fact-intensive inquiries into the intent of the parties, the circumstances of their divorce, and their post-divorce relationship. Furthermore, this Court already has recognized that

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[11] *See also National Auto. Dealers and Assocs. Retirement Trust v. Arbeitman*, 89 F.3d 496, 501 (8th Cir. 1996) (ex-spouses "'maintained an amicable relationship,'" and "after the divorce, [the ex-husband] maintained [the ex-wife] as the plan beneficiary"); *Fox Valley*, 897 F.2d at 277-78 (couple continued to live together for two years after divorce, and ex-wife believed that "even after the divorce, [the participant] intended for her to receive benefits from the Fund"); *id.* at 285 (Ripple, J., dissenting) (ex-wife "alleges that [the participant] made clear, both before and after the divorce, that he expected that the benefits would be payable to her"); *Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1461 (5th Cir. 1989) (after divorce, couple lived together "in common law marriage" for 11 years until participant's death).

ERISA is not to be applied based on the likely intent of the parties. *See Egelhoff*, 532 U.S. at 147-48 & n.2; *id.* at 154 (Breyer, J., dissenting) (taking the position, rejected by the majority, that state law should be upheld because "it is designed to carry out . . . the employee's likely intention").

Second, petitioner argues (Pet. Br. 36, 40) that a decision not to recognize waivers in non-qualified divorce decrees would be inequitable and result in a windfall for the purportedly waiving spouse. This contention rests on the incorrect assumption above that plan administrators can determine what the parties intended and therefore whether more was received than contemplated.

But beyond that, this Court has rejected the idea that the provisions of ERISA should be bent to achieve what judges regard as fair and equitable. Neither the anti-alienation provision nor the QDRO provision is subject to "any generalized equitable exception" (*Guidry*, 493 U.S. at 376) even where "[t]he fairness of the [statute] might be debated" (*Boggs*, 520 U.S. at 854) or the result is "distaste[ful]" (*Guidry*, 493 U.S. at 377). Section 1056(d) "reflects a considered congressional policy choice" (*id.* at 376), and the Court "must respect its policy" (*Boggs*, 520 U.S. at 854). To the extent petitioner questions the wisdom of these ERISA provisions, that is a matter that "should be left to Congress." *Guidry*, 493 U.S. at 377.

Third, petitioner asserts (Pet. Br. 26, 28) that ERISA should be construed in light of its purpose to protect retirement benefits. ERISA, however, serves not one

but two purposes and reflects the balance that Congress struck between them: (1) to protect pension benefits, and (2) to minimize burdens on plan administrators and avoid unnecessary costs and delays. *See* pages 30-31, *supra*; *see also* pages 56-57, *infra*. Courts must respect that congressional balance. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). *See also, Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002); *United States v. Kahn*, 415 U.S. 143, 151 (1974).

Furthermore, both petitioner and Liv claim a right to William's pension benefit. The exhortation to protect retirement benefits, therefore, does not resolve this dispute.

Finally, as a matter of statutory construction, this Court has rejected the argument that ERISA's general purpose overrides the express provisions Congress enacted into law:

> In the last analysis, petitioners and the United States ask us to give a strained interpretation to [the statute] in order to achieve "the purpose of ERISA to protect plan participants and beneficiaries." . . . *[V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text* regarding the specific issue under consideration.

Mertens, 508 U.S. at 261-62 (emphasis added).

Although petitioner's claim against the Plan under ERISA must fail, she might have a cause of action against Liv (but not against the Plan) pursuant to state law to recover the amount of the benefits after they were paid to Liv. Under petitioner's view, Liv waived her right to William's pension benefit in the divorce decree. While ERISA prohibits a plan administrator from recognizing that purported waiver, it is possible that state law would allow an action by petitioner against Liv to enforce the property settlement on non-ERISA grounds such as, *e.g.*, breach of the contract between Liv and William for which petitioner is a third-party beneficiary, unjust enrichment, or violation of the state court's divorce order.

ERISA's anti-alienation provision would not prevent petitioner from recovering against Liv on such a claim. *See* AARP Am. Br. 16. That provision applies only to a plan. *See* § 1056(d)(1); 26 C.F.R. § 1.401(a)–13(c)(1)(ii). Thus, courts have recognized that ERISA's anti-alienation prohibition applies only before, and not after, pension benefits are paid. *See, e.g.*, *Boggs*, 520 U.S. at 852 (anti-alienation provision applies to "undistributed pension benefits"); *id.* at 862 (Breyer, J., dissenting); *Mackey*, 486 U.S. at 836 ("Section [1056(d)(1)] bars the assignment or alienation of pension plan *benefits*, and thus prohibits the use of state enforcement mechanisms *only insofar as they prevent those benefits from being paid to plan participants*") (second emphasis added).[12]

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[12] Five circuits have held that the anti-alienation provision applies only to benefits not yet paid by the plan. *See DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 974 (6th Cir. 2006),

(Cont'd)

In this regard, the ERISA anti-alienation provision differs from, and is narrower than, the anti-alienation section in other federal statutes.[13]

Accordingly, ERISA's anti-alienation provision does not preclude a claimant like petitioner from suing an ex-spouse like Liv on a theory of waiver to enforce her

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(Cont'd)

cert. denied, 127 S.Ct. 2971 (2007); *Hoult v. Hoult*, 373 F.3d 47, 49-51 (1st Cir.) (collecting cases), *cert. denied*, 543 U.S. 1002 (2004). The Fourth Circuit alone has concluded that the anti-alienation provision continues to apply to annuity payments received after a participant reaches retirement age, but nevertheless agreed that the anti-alienation order applies to a lump-sum distribution like the one in this case. *United States v. Smith*, 47 F.3d 681, 682-84 (4th Cir. 1995).

[13] Congress knew how to draft an anti-alienation section that applies to benefits that have been distributed, but it did not do so in ERISA. Where Congress has intended the anti-alienation sections in other statutes to apply after distribution, the text of the statute makes that clear. For example, the Railroad Retirement Act, 45 U.S.C. § 231m(a), states that "no annuity . . . shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 n.24 (1979) (holding that benefits are not community property and distinguishing the more limited scope of the ERISA provision). The Social Security Act, 42 U.S.C. § 407(a)(1), prohibits the attachment of "the moneys paid or payable" to the beneficiary. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973). The Veterans' Benefits Act, 38 U.S.C. § 5301(a), makes payments of benefits "made to, or on account of, a beneficiary . . . exempt from the claims of creditors . . . either before or after receipt of the beneficiary." *See Porter v. Aetna Casualty & Sur. Co.*, 370 U.S. 159 (1962)

interpretation of the divorce decree as a matter of state law in state court. Indeed, state courts have recognized such state-law claims and held that they are not barred by ERISA. *See, e.g., Sweebe v. Sweebe*, 712 N.W.2d 708 (Mich. 2007); *Wichek v. Wichek*, 83 Pa. D. & C.4th 525, 2006 WL 5164943 (Pa. Com. Pl. Mar. 29, 2006); *Pardee v. Pardee*, 112 P.3d 308 (Okla. Civ. App. 2005); *Sulzer v. Diedrich*, 664 N.W.2d 641 (Wis. 2003); *Brosamer v. Mark*, 561 N.E.2d 767 (Ind. 1990); *Hawxhurst v. Hawxhurst*, 723 A.2d 58 (N.J. Super. Ct. App. Div. 1998); *see also Brown v. Wright*, 511 F. Supp. 2d 850 (E.D. Mich. 2007). Such state-law litigation would allow the parties with a stake in the dispute to resolve their competing claims in a state-court forum without suing the plan.

c. *Petitioner's remaining arguments are without merit.*

Finally, petitioner raises a miscellany of arguments against the Fifth Circuit's decision. None of these arguments has merit.

Petitioner contends (Pet. Br. 55) that the decision below presents federalism issues and infringes on the authority of state law and state courts. As this Court has recognized, however, ERISA does not violate federalism principles. *See Egelhoff*, 532 U.S. at 151-52 & n.4; *Boggs, supra; see also Ridgeway v. Ridgeway*, 454 U.S. 46, 54 (1981); *Hisquierdo*, 439 U.S. at 581.

Petitioner also asserts (Pet. Br. 40, 57) that the decision below will invite improper forum shopping. This Court's decision, however, will be binding on federal and state courts alike and thus there will be no incentive to choose one court system over the other.

Petitioner next argues (Pet. Br. 65) that the Fifth Circuit's decision is incorrect in light of the availability of interpleader for plan administrators confronted with competing claims to benefits. However, interpleader is unavailable where a plan does not know that there are competing claimants because the non-qualified divorce decree (unlike a proposed QDRO) was not submitted to the plan before the payment of benefits to the designated beneficiary.

Furthermore, interpleader has no analytical bearing on the proper construction of ERISA. Even where interpleader is invoked, the court still would have to adjudicate the anti-alienation issue and interpret the non-qualified divorce decree in order to determine which claimant is the proper beneficiary; interpleader merely transfers responsibility for the decision from the plan administrator to a court. In this case, moreover, petitioner would have been no better off if the Plan had pursued interpleader.

In addition, interpleader is not an effective solution in ERISA cases. It entails significant legal costs for the competing parties and even for the interpleading plan.[14]

[14] *See, e.g., Rhoades v. Casey*, 196 F.3d 592, 595 (5th Cir. 1999) (plan administrator awarded legal fees of $24,000 in interpleader case where beneficiaries received $53,000), *cert. denied*, 531 U.S. 924 (2000); *Stobnicki*, 868 F.2d at 1464 ("[I]t will not take long to deplete a pension fund of some $72,000, so that the litigant declared the beneficiary by the court wins little more than a Pyrrhic victory. The victor, forced to pay attorney fees from the retirement proceeds, will be left with little or nothing to live on"); *MacInnes v. MacInnes*, 677 N.W.2d 889, 897 (Mich. Ct. App. 2004) (Murphy, J., concurring) (interpleader actions are "burdensome to plan administrators").

It also can lead to significant delays in the distribution of benefits to the rightful claimant – a substantial disadvantage under a statute that is intended to protect retirement benefits that many people need to live on. In the end, these burdens of expense and delay are borne by the beneficiaries of the plan. As this Court explained in *Egelhoff*:

> If [plan administrators] decide to await the results of litigation before paying benefits, they will simply transfer to the beneficiaries the costs of delay and uncertainty. . . . [L]et[ting] courts . . . settle the matter . . . [means] the costs of delay and uncertainty can be passed on to beneficiaries, thereby thwarting ERISA's objective of efficient plan administration.

532 U.S. at 149 & n.3. Thus, "Congress could not have intended that pension benefits . . . [would routinely] entail complex, expensive, and time-consuming litigation." *Boggs*, 520 U.S. at 853.

Lastly, petitioner argues (Pet. Br. 22, 34-35, 39, 60-63) that a decision refusing to create a federal common law of waiver in divorce cases will mean that common law does not apply in other areas such as so-called "settlement" and "slayer" cases. Of course, these other questions are not presented here and need not be resolved in order to decide this case. But at all events petitioner's concerns are unfounded.

The disposition of this case critically involves the express QDRO provision that Congress enacted in the

marital-dissolution context. There is no comparable provision for "settlement" or "slayer" cases. Whether or not in those cases there is a gap in the statute that may appropriately be filled in by common law, no such gap exists in this case.

Nor will the analysis underlying the "settlement" and "slayer" cases be affected by the decision in this case. The leading "settlement" case is *Stobnicki*, *supra*, in which the Fifth Circuit held that the settlement of a good-faith dispute between competing claimants for pension benefits does not violate the anti-alienation provision. Central to that decision was the fact that the right to benefits was contested and therefore the settlement did not involve an assignment or alienation of benefits to which either party was entitled under ERISA. *See* § 1056(d)(1). Thus, in settling the controversy, neither of the claimants alienated his benefits, but rather each agreed that he was not entitled to the full amount initially claimed. *Stobnicki*'s reasoning, coupled with the obvious and substantial public interest in the settlement of litigation, makes that decision both readily explicable and entirely distinguishable. Indeed, the Fifth Circuit below concluded that its ruling in the present case is not inconsistent with its previous decision in *Stobnicki*. *See* Pet. App. 9.

Likewise, the "slayer" cases rest on a rationale that will be unaffected by the decision here. As the Court explained in *Egelhoff*, and as the United States agrees (U.S. Am. Br. 30-31), the "slayer" principle was settled law at the time Congress enacted ERISA and may not conflict with the statute:

> [T]he principle underlying the [slayer] statutes – which have been adopted by nearly

> every State – is well established in the law and have a long historical pedigree predating ERISA. . . . And because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.

532 U.S. at 152. *See also* U.S. Am. Br. 30 ("the proper approach would be to interpret that background ['slayer'] rule to be implicit in ERISA" rather than create federal common law).

Accordingly, as the Court concluded in *Egelhoff* (532 U.S. at 152), and as the government urges here (U.S. Am. Br. 30), the Court need not and should not resolve the "slayer" issue in deciding the present case.

2. Even if Liv's purported waiver is not an "assignment" or "alienation," the Plan could not recognize it under the anti-alienation provision.

As demonstrated above, Liv's purported waiver is an "assignment" or "alienation" subject to the anti-alienation provision. However, even if the Court disagrees with that argument, the Plan still could not recognize Liv's purported waiver.

Under ERISA, it is not a prerequisite to the applicability of the anti-alienation provision that the purported waiver be a common-law assignment. By the explicit terms of the statute, the anti-alienation provision applies to "the creation, assignment, or recognition" of a benefit under a non-qualified order. § 1056(d)(3)(A).

Here, at the least, the divorce decree includes a "recognition" of William's rights regarding the pension benefits. The decree not only "divested" Liv of such benefits but affirmatively "awarded" them to William. Pet. App. 64. For this reason, the anti-alienation provision barred the Plan from following the decree.

The government's position seeks to distort the statute by ignoring the critical text:

> Although Section 1056(d)(3)(A) provides that ERISA's anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order," unless the order is a QDRO, *there is no reason to conclude that Congress intended by using the terms "creation" and "recognition" to expand the prohibition against "assignment" and "alienation" beyond its ordinary meaning.*

U.S. Am. Br. 13 (emphasis added). The United States thus improperly reads the otherwise unrestricted term "recognition" as if it did not exist. Contrary to the government's argument, the statutory language on its face is sufficiently clear and encompassing to render the anti-alienation provision applicable to the decree in this case.

B. The QDRO Provision Prohibits Pension Plans From Following Non-Qualified Domestic Relations Orders.

Wholly apart from the anti-alienation provision, the QDRO provision prohibits pension plans from paying benefits based on non-qualified domestic relations orders. Where an order is not qualified, a plan cannot follow it under ERISA.

Section 1056(d)(3)(H)(iii) provides that if an order is not qualified, "the plan administrator *shall pay* the . . . [benefits] to the person or persons who would have been entitled to such amounts *if there had been no order*" (emphasis added). Thus, "[a] plan *cannot* obey a court order that *is not* qualified." Moss, *supra*, at 86 (emphasis in original). Section 1056(d)(3)(I) provides that if a plan administrator, acting in accordance with ERISA's fiduciary standards, determines that an order is not qualified, payment under subparagraph (H) as if there had been no order discharges the plan's payment obligation. Conversely, if the order is qualified, "the plan administrator shall pay the . . . [benefits] to the person or persons entitled thereto [under the order]." § 1056(d)(3)(H)(ii).

Here, because the divorce decree was a non-qualified order, the QDRO provisions prohibited the Plan from following the order and required it to pay benefits as if there were no order. In accordance with

William's beneficiary designation, therefore, Liv was the rightful beneficiary.[15]

C. The Preemption Provision Bars Recognition Of A Purported Waiver In A Non-Qualified Divorce Decree.

ERISA's preemption provision also prevents a plan from recognizing a purported waiver of benefits in a non-qualified domestic relations order. Because ERISA preempts a divorce decree that, as here, is not a QDRO, the Plan correctly paid benefits to the designated beneficiary.

ERISA expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." § 1144(a). This Court has "observed repeatedly that this broadly worded provision is 'clearly expansive'" (*Egelhoff*, 532 U.S. at 146 (citation omitted)) and "was 'designed to establish pension plan regulation as exclusively a federal concern.'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (citations omitted).

A state divorce decree is subject to ERISA preemption. For purposes of ERISA preemption, "State law" includes "decisions" or other "State action having

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[15] The government attempts to avoid this by arguing that a divorce decree is a domestic relations order only if it creates or recognizes the existence "of *an alternate payee's right*" to benefits. U.S. Am. Br. 13, quoting § 1056(d)(3)(B)(i)(I). But "alternate payee" appears only in the definition of a "*qualified* domestic relations order"; the definition of "domestic relations order" does not refer to that term. § 1056(d)(3)(B)(ii).

the effect of law." § 1144(c)(1). Thus, "Congress used . . . broad language in defining the 'State law' that would be pre-empted." *Ingersoll-Rand*, 498 U.S. at 138-39. This provision comfortably encompasses state divorce decrees. As the Court has observed, "a state divorce decree, like any other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Ridgeway*, 454 U.S. at 55.

Like the anti-alienation provision, the preemption provision contains an express exception for QDROs but not non-qualified orders. *See* § 1144(b)(7). Thus, non-qualified domestic relations orders are preempted by ERISA. *See Boggs*, 520 U.S. at 846-47 ("QDRO's, unlike domestic relations orders in general, are exempt from both the pension plan anti-alienation provision . . . and the general preemption clause").

The legislative history makes clear that *only* qualified domestic relations orders are excepted from preemption. The Senate Finance Committee explained "that conforming changes to the ERISA preemption provision are *necessary to ensure that only* those orders *that are exempted from the spendthrift provisions [i.e., QDROs] are not preempted by ERISA.*" S. Rep. No. 98-575, at 19 (emphasis added). As the Committee stated, a domestic relations order is excepted from the anti-alienation provision *"if and only if the order is a qualified domestic relations order,"* and likewise a QDRO – and only a QDRO – is "exempt from federal preemption under ERISA." *Id.* (emphasis added).

Similarly, the House Report emphasized that the preemption section was being amended "to reflect the limited exception" for QDROs and only "to this limited extent." H.R. Rep. 98-655 (pt. 1), at 42. Thus, domestic relations orders "*have to meet* [the] specific requirements" for QDROs "*if they are to be honored by the plan.*" *Id.* at 39 (emphasis added). Accordingly, "*except as expressly provided [for QDROs], nothing in the bill is intended to limit or otherwise change the original broad intent behind ERISA's rule of preemption.*" *Id.* at 42 (emphasis added).

Finally, the legislative record shows that Congress intended to preempt non-qualified domestic relations orders, and to exempt only QDROs from preemption, for the same reasons that it excepted only QDROs from the anti-alienation provision: to minimize the costs and burdens on covered plans in order to ensure the practical administrability of the plans. *See* pages 30-31, *supra*.

Under the foregoing principles, a state divorce decree is preempted under ERISA unless it is a QDRO. Because, as petitioner concedes, the Kennedys' divorce decree is not a QDRO, it is preempted, and the Plan could not follow it in paying the disputed pension benefits.

II. BECAUSE ERISA REQUIRES THAT A PLAN BE ADMINISTERED AND BENEFITS DETERMINED IN ACCORDANCE WITH THE PLAN DOCUMENTS, A PLAN CANNOT PAY BENEFITS PURSUANT TO A DIVORCE DECREE THAT IS NOT A QDRO.

As an alternative ground for affirmance, the judgment below should be upheld on the basis of the "plan documents" requirement of ERISA. It is well settled that "[t]he winning party below . . . can generally defend . . . the judgment in that party's favor on any ground properly raised in the court below . . . even though that court . . . ignored it." E. Gressman, *et al.*, SUPREME COURT PRACTICE § 6.26(c), at 465 (9th ed. 2007).

Respondents properly raised the "plan documents" argument in the court below. *See* DuPont Ct. of App. Br. 16-20, 30, 33-35; DuPont Ct. of App. Reply Br. 6-9. Likewise, they preserved it in their brief in opposition in this Court. *See* Br. in Opp. 13-14 & n.9. Moreover, although the Fifth Circuit did not address the "plan documents" issue here because it ruled in respondents' favor on the basis of the anti-alienation and QDRO provisions, the court has rejected that argument in other cases. *See* Pet. App. 5-7; *see also* Pet. 9-13.[16] Finally, in accordance with the usual procedure for a petitioner to address a respondent's alternative ground for affirmance, petitioner will be able to address the question in her reply brief.

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[16] Although those other cases involved, as the court below explained, welfare plans rather than pension plans, the "plan documents" requirement (unlike the anti-alienation provision) applies equally to both types of plans.

Respondents therefore agree with the Solicitor General that the Court should consider the "plan documents" issue without remanding the case to the court of appeals for a decision of the question in the first instance.

A. Under ERISA, Plans Must Be Administered In Accordance With The Terms Of The Plan Documents.

As the United States and AARP agree, ERISA's "plan documents" requirement fully supports the judgment below. As the government explains:

> A rule that would require plan administrators to recognize a waiver contained in a state-divorce decree, even when the participant has not taken the steps necessary to effectuate the waiver, and thus allow the decree to trump the beneficiary designated according to the plan, would conflict with the plan administrator's duties under ERISA and would undermine the principles of plan administrability that underlie the statute.

U.S. Am. Br. 25.

Under ERISA's "plan documents" provisions, a plan must be administered in accordance with the terms of the plan documents, including those governing beneficiary designations. Here, William designated Liv to be his beneficiary under the SIP and – although he could have done so by submitting a form at any time during the seven years between the divorce and his death – he never changed his designation. Because Liv

was the designated beneficiary pursuant to the terms of the Plan, and because the Kennedys' divorce decree was not a QDRO, payment to petitioner based on the non-qualified decree would have been inconsistent with the Plan and therefore was precluded by ERISA. *See McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) ("[a] plan participant is the master of his own ERISA plan").

ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." § 1102(a)(1). The written instrument must "specify the basis on which [benefit] payments are made . . . from the plan" (§ 1102(b)(4)), and the administrator must make payments to the "'beneficiary' . . . designated by a participant, or by the terms of . . . [the] plan" (§ 1002(8)). And a plan administrator, acting as a fiduciary, must "discharge his duties . . . in accordance with the documents and instruments governing the plan." § 1104(a)(1)(D).

The "plan documents" requirement serves two principal purposes.

1. First, the "plan documents" requirement protects the interests of participants and beneficiaries. It ensures "'that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.'" *Curtis-Wright Corp. v. Schoenejongen*, 514 U.S. 73, 83 (1995), quoting H.R. Rep. No. 93-1280, at 297 (1974). "[T]he payment of benefits . . . [is] a central matter of plan administration" (*Egelhoff*, 532 U.S. at 148), and the ERISA "scheme . . . is built around reliance on plan documents" (*Curtis-Wright*, 514

U.S. at 83). Thus, rightful beneficiaries are correctly determined and promptly paid.

2. Second, the "plan documents" requirement "enables plan administrators . . . [to] manage the plan on a day-to-day level" in a practical and efficient manner. *Curtis-Wright*, 514 U.S. at 82. "The most efficient way [for a plan] to meet [its] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). This is crucial to the workable operation of the benefit system.

The legislative history reflects this congressional policy. Congress recognized that employee benefit plans are not mandatory but rather are optional at the election of the employer. *See* H.R. Rep. No. 93-807, at 8, 14; H.R. Rep. No. 93-533, at 1, 9 (1973). Thus, Congress expressed concern that the costs of financing and administering a benefit plan could deter the establishment and growth of plans, and it understood the need to "strike a balance" between providing meaningful reform and keeping costs within reasonable limits." H.R. Rep. No. 93-807, at 15. Congress therefore "weighed carefully the additional costs to the employers and minimized these costs to the extent consistent with minimum standards for retirement benefits." H.R. Rep. No. 93-779, at 2. *See Beck v. Pace Int'l Union*, 127 S. Ct. 2310, 2314 (2007) (benefit plans are voluntary); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) (there is a "'public interest in encouraging the formation of employee benefit plans'") (citation omitted).

This Court has recognized "the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators." *Egelhoff*, 532 U.S. at 149-50, quoting *Ingersoll-Rand*, 498 U.S. at 142. Congress thus had "competing purposes": the "desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497. *See also Mertens*, 508 U.S. at 262-63 ("the text adopted by Congress has struck . . . the balance between th[e] competing goals . . . 'of benefiting employees and . . . of containing pension costs'") (citation omitted).

The "plan documents" requirement serves to ensure that administrators are able – efficiently, promptly, and correctly – to "make payments simply by identifying the beneficiary specified in the plan documents." *Egelhoff*, 532 U.S. at 148. For reasons of administrability, pension plans "rely heavily on forms, such as designations of beneficiaries." *Blue*, 160 F.3d at 385-86. The "plan documents" requirement manifests the importance of such forms under ERISA.

The QDRO provisions were designed to promote the same congressional policy of efficiency and simplicity through the same means of plan documents. As discussed above (*see* pages 30-31, *supra*), Congress enacted the QDRO provisions to require that plan administrators be furnished, in the proposed order itself, with all of the statutorily enumerated information necessary to determine whether the order is "qualified."

See Hamilton, 433 F.3d at 1097 (a QDRO must "'clearly contain[ ] the information specified in the statute that a plan administrator would need to make an informed decision'") (citation omitted). Thus, "Congress 'required that QDROs be specific and clear' because it was 'concerned with reducing the expense to plan providers.'" *Id.* at 1096-97 (citation omitted).

Furthermore, proposed QDROs are submitted to the plan administrator, and the administrator determines whether the order satisfies the statutory criteria to be a "qualified" order. *See* § 1056(d)(3)(G)(i)(II); *Hamilton*, 433 F.3d at 1097 & n.7; *Dorn v. International Bhd. of Elec. Workers*, 211 F.3d 938, 942, 943-44 (5th Cir. 2000); *Fox Valley*, 897 F.2d at 783 (Easterbrook, J., dissenting). In this way, the plan "is on notice of its exact obligations" (*Hamilton*, 433 F.3d at 1097) to pay the alternate payee under a valid QDRO rather than the beneficiary designated by the participant on the plan form. Thus, QDROs further the congressional policy of "'protecting [plan administrators] from suits for making improper payments.'" *Id.* (citation omitted). In essence, a QDRO submitted to and approved by the plan becomes – like the completed beneficiary-designation form itself – a plan document. *See Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting); *Silber*, 786 N.E.2d at 1267; U.S. Am. Br. 25.

B. The Decisions That Have Rejected The "Plan Documents" Rule Are Incorrect.

The Sixth and Second Circuits, and the Michigan Supreme Court, have correctly adhered to ERISA's "plan documents" rule. *See Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415, 420-21 (6th Cir. 1997); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-16 (2d Cir. 1993) (federal common law); *Sweebe v. Sweebe*, 712 N.W.2d 708, 711-14 (Mich. 2006). In addition, a number of judges have indicated their agreement with this argument. *See Altobelli*, 77 F.3d at 82 (Wilkinson, C.J., dissenting); *Fox Valley*, 897 F.2d at 282, 283 (Easterbrook, J., dissenting); *id.* at 284 (Ripple, J., dissenting); *Strong*, 701 N.W.2d at 331 (Connolly, J., dissenting); *Keen*, 121 S.W.2d at 728 (Hecht, J., dissenting).

Admittedly, a majority of courts have held that a plan must recognize a waiver of benefits in a non-qualified divorce decree even if the plan documents designate a different beneficiary. *See* Pet. Br. 31-32 (collecting cases). These decisions, however, do not withstand scrutiny.

> [N]ot one of the courts in the majority has explained why the statutory analysis used by these courts adopting the plan-documents rule is flawed. . . . Because the waiver rule is based, at best, on throwaway, conclusory statements rather than a careful analysis of statutory language, . . . the fact that a majority of cases have adopted it is entitled to little weight.

Strong, 701 N.W.2d at 331 (Connolly, J., dissenting).

Those courts holding that plans must follow a purported waiver rather than the plan documents have stated that (1) ERISA already requires administrators to go beyond plan documents in paying benefits pursuant to a QDRO, and (2) following a non-qualified divorce decree imposes no greater burden on administrators than what Congress already has imposed in connection with QDROs. Both parts of this analysis are badly mistaken.

Payment of benefits under a QDRO is fully consistent with the "plan documents" requirement. ERISA expressly requires plans to "provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." § 1056(d)(3)(A). Because plans must provide for payment in accordance with QDROs, administrators are complying with rather than departing from the plan when they pay benefits pursuant to a QDRO.

These courts also are wrong that following non-qualified orders would impose no greater burden on plan administrators than do qualified orders. As explained above, the whole point of the QDRO provision is to *minimize* the burdens on plans. Following QDROs that conform to the strict requirements in the statute and are submitted to the plan is immeasurably easier than trying to follow non-qualified orders that need not comport with any legal standard (and in fact vary widely in content and form) and may not even be submitted until after benefits have been paid to the designated beneficiary. *See McGowan*, 423 F.3d at 247; U.S. Am. Br. 28. Furthermore, Congress itself, in enacting the QDRO provision, correctly recognized the enormous

difference between qualified and non-qualified orders and purposely limited the anti-alienation and preemption exceptions to QDROs precisely in order to avoid the vastly greater burdens that non-qualified orders would have on plans. *See* pages 30-32, *supra*; *Altobelli*, 77 F.3d at 83 (Wilkinson, C.J., dissenting) ("Congress was concerned with the very problems that face us here when it defined the requirements to establish a QDRO, and it took pains to ensure that enforcement of QDROs would not produce inefficiency and uncertainty").

ERISA therefore forecloses the analysis of those courts that have refused to follow the applicable plan documents. ERISA's "clear statutory command, together with the plan provisions, answer the question; the documents control, and those name [the ex-wife]." *McMillan*, 913 F.2d at 311-12. *See also Altobelli*, 77 F.3d at 82 (Wilkinson, C.J., dissenting). As then-Chief Judge Wilkinson observed, "[w]hat seem like small equitable steps in a particular case may lead to large administrative headaches in the aggregate." *Id.* at 84 (dissenting opinion).

C. Under ERISA And The SIP Documents, The Plan Could Not Recognize The Purported Waiver In The Divorce Decree And Was Required To Pay Liv As The Designated Beneficiary.

Under the terms of the SIP, the Plan could not follow the purported waiver in the non-qualified divorce decree. Instead, it was required to pay William's account balance to Liv in accordance with his beneficiary designation.

The SIP documents are clear and not disputed by petitioner. The SIP entitled each participant to "designate any beneficiary or beneficiaries he chooses to receive all or part of his interests . . . in case of his death." J.A. 48. The SIP also allowed him to "replace or revoke such designation." *Id.* Any designation, replacement, or revocation had to be made in the manner prescribed by the plan (*id.* at 52), and the company supplied forms for such purposes (*id.* at 34, 56-57). Moreover, the Plan's rules for paying benefits upon the participant's death were clearly communicated to employees in the Summary Plan Description: "If you die before receiving your SIP account balances, your beneficiary(ies) will receive the balance in your accounts." J.A. 43. *See also* Summary Plan Description, p. 22 (D.I. 40, Ex. C, D0027) ("[g]enerally, plan benefits may be paid only to . . . your beneficiaries or survivors . . . [but] an exception to this may be made as a result of a qualified domestic relations order") (emphasis omitted).

Although he had ample opportunity, William never changed his beneficiary designation under the SIP. He did, however, make a post-divorce change in his beneficiary designation under the separate Pension and Retirement Plan (*see* page 9, *supra*), and thus was aware of his right to make such a change and the simple process for doing so.

Accordingly, the applicable plan documents obligated the Plan to pay William's SIP account balance to Liv as the designated beneficiary. Contrary to petitioner's contention, it would have violated ERISA for the Plan to disregard the beneficiary designated by William under the SIP. *See McMillan*, 913 F.3d at 312 ("it was [the participant's] designation which controls, not [his ex-wife's] intent").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTORY PROVISIONS

Relevant Provisions of ERISA,
29 U.S.C. §§ 1001 *et seq.*

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee

organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits

> of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in section 457(e)(11)(D)(ii) of Title 26) making payments or supplements described in section 457(e)(11)(D)(i) of Title 26, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of Title 26) making payments of benefits described in section 457(f)(4)(A) of Title 26, shall, for purposes of this subchapter, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam,

Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343)

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a

fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

* * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

§ 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that—

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

* * *

Appendix

(c) Plans meeting requirements of section

(1) A plan meets the requirements of this section only if

(A) under the plan, each participant—

(i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both),

(ii) if the participant elects a waiver under clause (i), may elect the qualified optional survivor annuity at any time during the applicable election period, and

(iii) may revoke any such election at any time during the applicable election period, and

(B) the plan meets the requirements of paragraphs (2), (3), and (4).

(2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless—

(A) (i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits)

which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or

(B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.

Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

(3)(A) Each plan shall provide to each participant, within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary of the Treasury may prescribe) a written explanation of—

(i) the terms and conditions of the qualified joint and survivor annuity and of the qualified optional survivor annuity,

(ii) the participant's right to make, and the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,

(iii) the rights of the participant's spouse under paragraph (2), and

(iv) the right to make, and the effect of, a revocation of an election under paragraph (1).

(B)(i) Each plan shall provide to each participant, within the applicable period with respect to such participant (and consistent with such regulations as the Secretary may prescribe), a written explanation with respect to the qualified preretirement survivor annuity comparable to that required under subparagraph (A).

(ii) For purposes of clause (i), the term "applicable period" means, with respect to a participant, whichever of the following periods ends last:

(I) The period beginning with the first day of the plan year in which the participant attains age 32 and ending with the close of the plan year preceding the plan year in which the participant attains age 35.

(II) A reasonable period after the individual becomes a participant.

(III) A reasonable period ending after paragraph (5) ceases to apply to the participant.

(IV) A reasonable period ending after this section applies to the participant.

In the case of a participant who separates from service before attaining age 35, the applicable period shall be a reasonable period after separation.

(4) Each plan shall provide that, if this section applies to a participant when part or all of the participant's accrued benefit is to be used as security for a loan, no portion of the participant's accrued benefit may be used as security for such loan unless—

(A) the spouse of the participant (if any) consents in writing to such use during the 90-day period ending on the date on which the loan is to be so secured, and

(B) requirements comparable to the requirements of paragraph (2) are met with respect to such consent.

(5)(A) The requirements of this subsection shall not apply with respect to the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit,

as the case may be, if such benefit may not be waived (or another beneficiary selected) and if the plan fully subsidizes the costs of such benefit.

(B) For purposes of subparagraph (A), a plan fully subsidizes the costs of a benefit if under the plan the failure to waive such benefit by a participant would not result in a decrease in any plan benefits with respect to such participant and would not result in increased contributions from such participant.

(6) If a plan fiduciary acts in accordance with part 4 of this subtitle in—

(A) relying on a consent or revocation referred to in paragraph (1)(A), or

(B) making a determination under paragraph (2),

then such consent, revocation, or determination shall be treated as valid for purposes of discharging the plan from liability to the extent of payments made pursuant to such Act.

(7) For purposes of this subsection, the term "applicable election period" means—

(A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the 180-day period ending on the annuity starting date, or

(B) in the case of an election to waive the qualified preretirement survivor annuity, the period which begins on the first day of the plan year in which the participant attains age 35 and ends on the date of the participant's death.

In the case of a participant who is separated from service, the applicable election period under subparagraph (B) with respect to benefits accrued before the date of such separation from service shall not begin later than such date.

(8) Notwithstanding any other provision of this subsection—

(A)(i) A plan may provide the written explanation described in paragraph (3)(A) after the annuity starting date. In any case to which this subparagraph applies, the applicable election period under paragraph (7) shall not end before the 30th day after the date on which such explanation is provided.

(ii) The Secretary of the Treasury may by regulations limit the application of clause (i), except that such regulations may not limit the period of time by which the annuity starting date precedes the provision of the written explanation other than by providing that the annuity starting date may not be earlier than termination of employment.

(B) A plan may permit a participant to elect (with any applicable spousal consent) to waive any requirement that the written explanation be provided at least 30 days before the annuity starting date (or to waive the 30-day requirement under subparagraph (A)) if the distribution commences more than 7 days after such explanation is provided.

§ 1056. Form and payment of benefits

* * *

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and

is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph—

(i) the term "qualified domestic relations order" means a domestic relations order—

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order

(including approval of a property settlement agreement) which—

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies—

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order—

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee—

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin

under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" means the earlier of—

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order—

> **(i)** the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and
>
> **(ii)** if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan—

> **(I)** the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and
>
> **(II)** within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures—

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the

order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v)—

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in—

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subpara-graph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or

a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 1673(a) of Title 15.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if—

(A) the order or requirement to pay arises—

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle [section 1101 et seq. of this title], or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle [section 1101 et seq. of this title] by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 1055 of this title apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made—

(i) either—

(I) such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 1055(c) (2)(B) of this title), or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified pre-retirement survivor annuity is in effect in accordance with the requirements of section 1055(c) of this title,

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle, or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 1055(a)(1) of this title and under a qualified preretirement survivor annuity provided pursuant to section 1055(a)(2) of this title, determined in accordance with paragraph (5).

A plan shall not be treated as failing to meet the requirements of section 1055 of this title solely by reason of an offset under this paragraph.

(5)(A) The survivor annuity described in paragraph (4)(C)(iii) shall be determined as if—

(i) the participant terminated employment on the date of the offset,

(ii) there was no offset,

(iii) the plan permitted commencement of benefits only on or after normal retirement age,

(iv) the plan provided only the minimum-required qualified joint and survivor annuity, and

(v) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(B) For purposes of this paragraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 1002(23) of this title) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

* * *

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary

(A) by a person who is an employer or employee organization with respect to the plan or

(B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and

administration of the plan (including any procedure described in section 1105 (c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105 (c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Appendix

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103 (c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107 (d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107 (d)(4) and (5) of this title).

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)

(A) Except as provided in subparagraph (B), nothing in this subchapter shall be

construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003 (a) of this title, which is not exempt under section 1003 (b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393–1 through 393–51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare

arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002 (1)

and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056 (d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169 (a)(2)(A) of this title), and the provisions of law referred to in section 1169 (a)(2)(B)(ii) of this title to the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action—

> (A) with respect to which the State exercises its acquired rights under section 1169 (b)(3) of this title with respect to a group health plan (as defined in section 1167 (1) of this title), or
>
> (B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 1191 of this title.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137 (b) of this title) or any rule or regulation issued under any such law.

REPLY BRIEF

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In The
Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

versus

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits?

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SUMMARY OF ARGUMENT

The Kennedy Estate petitions this Court to reverse and render the Fifth Circuit's decision to invalidate ex-wife Kennedy's voluntary, attorney-negotiated, court-approved waiver of pension benefits. When Congress enacted ERISA's anti-alienation and QDRO provisions, it did not bar divorcing spouses from executing voluntary waivers of pension benefits in property settlements. Waivers are not assignments or alienations. And a QDRO is *a* safe-harbor, but not the only haven, available to spouses dividing marital property.

DuPont's "Plan Documents" defense exceeds the scope of this Court's *certiorari* grant. The Fifth Circuit's opinion focuses on QDROs, not "Plan Documents." This Court denied Issue #2 concerning "Plan Documents" and granted review on Issue #3 about QDROs. *If* DuPont's "Plan Documents" defense is before this Court, it rewrites ERISA. Neither ERISA nor DuPont's SIP defines beneficiary designations as plan documents, so judicial recognition of it would deny participants and beneficiaries notice of a doctrine that unfairly denies them benefits.

Enforcement of voluntary waivers will not materially increase the burdens of ERISA plan administrators. No administrator needs to keep track of divorces because waiver issues will only arise when an executor makes a plan administrator aware of a claim before payout. Beneficiaries usually resolve these disputes without litigation. When rival claimants

cannot resolve their differences, courts should render justice rather than reward injustice. In proper and efficiently-litigated interpleader actions, administrators can recover reasonable and necessary fees and minimize expenses.

ARGUMENT

I. Congress did not bar divorcing spouses from enforcing attorney-negotiated, court-approved, voluntary waivers of pension benefits.

A. ERISA's anti-spendthrift statute does not bar court-approved voluntary waivers of pension benefits enforceable under federal common law.

As this Court held in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), ERISA creates a federal common law of employee benefits. This Court applies traditional common law rule that any federal right can be waived. *See, e.g.*, FED. R. CIV. P. 4(d); 12(a)(1)(A)(2); SUP. CT. R. 15.5, 17.5.

Congress elected *not* to preclude divorcing spouses from executing voluntary, court-approved waivers of pension benefits when it enacted ERISA. If Congress had opposed voluntary pension waivers, it could have barred such waivers. The Securities Act of 1933 and the Securities Exchange Act of 1934 expressly declare waivers to be void, 15 U.S.C. § 77n and § 78bb, but ERISA contains no similar bar.

ERISA pre-empts state law at 29 U.S.C. § 1144(a) but preserves federal law at 29 U.S.C. § 1144(d).

Neither *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) nor *Boggs v. Boggs*, 520 U.S. 833 (1997) supports DuPont's refusal to recognize voluntary waivers. In *Egelhoff*, this Court struck down a state statute that revoked every beneficiary-designation at divorce. In *Boggs*, this Court considered whether ERISA pre-empts a statute allowing a non-participant spouse to "transfer by testamentary instrument an interest" in pension benefits, 520 U.S. at 835-36. This case does not concern a statute or a transfer but a waiver.

ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), states that, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." It bars assignments and alienations, not waivers. Ex-spouse Liv's waiver was neither an alienation nor an assignment. *McGowan v. NJR Service Corp.*, 423 F.3d 241, 248 (3d Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1118, 166 L. Ed. 2d 906 (2007) (Fuentes, J., dissenting).

In its brief at 6, the United States quotes pre-ERISA definitions of "assignment" and "alienation." *See Black's Law Dictionary* at 96 ("alienate") and 152 ("assign") (4th ed. 1968); *accord Webster's New International Dictionary* 65 ("alienate") and 166 ("assign") (2d ed. 1958). Those definitions show that Congress understood assignments and alienations to involve transfers and conveyances when it enacted and amended ERISA. A beneficiary does not transfer or

convey pension benefits, and thus does not assign or alienate them, by waiving, disclaiming, or renouncing them. *McGowan*, 423 F.3d at 248; *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275, 279 (7th Cir. 1990) (*en banc*).

The distinction between a waiver and an assignment or alienation is rooted in the common law of trusts, "ERISA's backdrop," *Beck v. Pace International Union*, ___ U.S. ___, 127 S.Ct. 2310, 2316 (2007) and "a starting point" for interpreting the statute, *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000). ERISA's prohibition is analogous to trust law spendthrift provisions. *Boggs*, 520 U.S. at 852. A beneficiary of a spendthrift trust can waive an interest. RESTATEMENT (THIRD) OF TRUSTS § 58(1) cmt. c at 359 (2003); RESTATEMENT (SECOND) OF TRUSTS § 36, cmt. c at 100 (1959); 3 SCOTT & ASCHER ON TRUSTS § 15.2.9, at 933-934 (5th ed. 2007). Ex-spouse Liv did not accept William's SIP benefits before her divorce and could not direct who received them afterwards, so she did not violate ERISA's spendthrift provisions.

B. ERISA's QDRO provision does not bar non-QDRO waivers of ERISA benefits enforceable under federal common law.

1. The QDRO statute applies only to "alternate payee" domestic relations "orders" enforcing state laws, not voluntary settlements.

The QDRO statute shows that Congress was concerned with orders that "create[] or recognize[] the existence of *an alternate payee's right* to, or assigns to *an alternate payee* the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. § 1056(d)(3)(B)(i)(I) (emphasis added). Although 29 U.S.C. § 1056(d)(3)(A)'s QDRO spendthrift law applies "to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order," Congress did not use "creation" and "recognition" to expand the bar against "assignment" and "alienation" beyond the ordinary meaning the Treasury Department gives those terms.

DuPont argues that 29 U.S.C. § 1056(d)(3)(H)(iii) compels a plan-administrator who receives a non-qualified domestic relations order to pay benefits as if there had been no such order. The statute states that an administrator "shall pay [benefits] to the person or persons who would have been entitled to such amounts as if there had been no such order. . . ." DuPont contrasts 29 U.S.C. § 1056(d)(3)(H)(ii), which states that an administrator must not pay someone who has presented a plan with a non-qualified

domestic relations order. But the statute applies comprehensively to "alternate payee" transfers.

The statute specifically targets court "orders" transferring property to alternate payees, not waivers in *voluntary settlement agreements*. Nothing in 29 U.S.C. § 1056 bars administrators from recognizing waivers. The Fifth Circuit has held that "a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other . . ." *Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989). Judge Easterbrook also concluded that voluntary settlement agreements do not violate the QDRO law:

> Matrimonial law does not require one or another disposition of property in an uncontested divorce. . . . The state court's approval of the private settlement is like a consent decree, which should be treated like a contract. . . . Consent decrees do not alter the legal obligations of strangers (here, of the Fund to enforce its written-designation rule).

Fox Valley, 897 F.2d at 282 (J. Easterbrook, dissenting), citing *Firefighters v. Cleveland,* 478 U.S. 501, 517-23 (1986). The QDRO statute governs orders enforceable under "a state domestic relations *law*," 29 U.S.C. § 1056(d)(3)(B)(ii)(II), not voluntary waivers. (Emphasis supplied).

2. REA's legislative history reflects Congress' intent to regulate transfers of pension benefits to alternate payees under alimony, spousal maintenance, child support, and community property laws, not to end voluntary waivers.

As the United States observes, "[t]he legislative history of the QDRO provision confirms the point" that REA regulates transfers of pension benefits to alternate payee transferees." Senate Report No. 575, 98th Cong., 2d Sess. 19 (1984) states that, "if a domestic relations order requires the distribution of all or a part of a participant's benefits under a qualified plan *to an alternate payee*," then the creation, recognition, or assignment of the "alternate payee's" right to benefits is not an assignment or alienation if and only if the order is a qualified domestic relations order. The statute only regulates "alternate payee" domestic relations orders requiring transfers to dependents under a "state domestic relations law (including community property law)" governing child support, alimony, post-marital maintenance, and divisions under community property laws. *See*, *e.g.*, 29 U.S.C. § 1056(d)(3)(G)(I) and (II). But it does not restrict voluntary waivers. The Kennedy divorce did not involve child support, an "alternate payee," or a court order pursuant to a state alimony, child-support, or court-decreed asset-division law. The QDRO statute does not apply to ex-spouse Liv's waiver.

3. A QDRO safe harbor for alternate-payee orders does not preclude divorcing spouses from voluntarily settling marital disputes.

Congress intended QDROs to serve as *one* exception to ERISA's prohibition on assignment of benefits to satisfy his or her family support obligations. *See* S. REP. NO. 575, at 18-19, *reprinted in* 1984 U.S.C.C.A.N. 2547 and 2564-65 (1984). As the United States notes in its brief at 13-14, Congress gave spouses a right to receive a survivor's annuity when those pension benefits are paid as an annuity. *See* 29 U.S.C. §§ 1055(a), (b)(1)(A), and (B). When the plan is not required to provide an annuity form, the participant does not elect to receive a life annuity, and other conditions are met, a surviving spouse has a right to receive the balance of the account on the participant's death. *See* 29 U.S.C. § 1055(b)(1)(C).

A participant can waive the survivor form of benefit, or designate a beneficiary other than the spouse to receive the balance of the participant's individual account, only if a spouse consents in writing. 29 U.S.C. §§ 1055(b)(1)(C)(i), (c)(2)(A) and (c)(3); 26 C.F.R. §§ 1.401(a)-20, 1.417(a)(3)-1. Absent a QDRO, REA's amendments do not restrict a plan-participant's power to waive the survivor benefit or to designate an alternate beneficiary with respect to an ex-spouse. Congress did not end waivers that become effective on divorce, for it expressly authorized participants to deny ex-spouses pension benefits and to agree to waivers of survivor benefits.

While Congress permitted non-participant spouses to approve a participant spouse's designation of a different beneficiary and to permit a participant spouse to make designations free from any requirement of further spousal consent under 29 U.S.C. § 1055(c)(2), it did not provide an exception to the anti-alienation provision, as it did for transfers to third-party alternative payees. Construing ERISA to prohibit spouses from relinquishing interests in pension benefits conflicts with important elements of the statutory scheme. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986).

Just as the aldermen of Boston have created a safe harbor without stopping anyone from anchoring at Marblehead, the QDRO is not ERISA's only harbor. *See* 29 U.S.C. § 1056(d)(2) (certain loans and voluntary, revocable assignments are not ERISA alienations and assignments). ERISA contains other sheltered havens, too. Department of Labor Interpretive Bulletin 96-1, codified at 29 C.F.R. § 2509.96-1 (1999); Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 51 (Winter 2000). An employer can offer non-ERISA 403(b) programs to employees while sheltering from ERISA's Title I requirements. 29 C.F.R. § 2510.3-1(j). When Congress amended the Securities Act of 1933 to create a safe harbor for forward-looking statements about securities, it did not bar or limit traditional laches, limitations, and release defenses. *See* 15 U.S.C. § 77z-2. In creating QDROs, Congress did not

bar or limit voluntary waivers. *See* Jeffrey Gorris, *Waivers of ERISA Plan Benefits: Preventing Judicial Interpretations of a Complex Statute from Frustrating the Statute's Simple Purpose*, 155 U. PA. L. REV. 717, 741-42 (2007).

4. The Treasury Department's interpretation of 26 C.F.R. § 1.401(a)-13(c)(1)(ii) is entitled to deference.

The United States' interpretation of ERISA's spendthrift statute reconciles the Treasury and Labor Departments' interpretations of "alienations" and "assignments" in 26 C.F.R. § 1.401(a)-13(c)(1)(ii) and is entitled to great deference. Those Secretaries determine whether a voluntary waiver should be understood as an "assignment" or "alienation" under ERISA's QDRO provision. *Cf. Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339, 2349 (2007) (deference); *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Congress granted Labor rule-making and enforcement authority under ERISA, *e.g.*, 29 U.S.C. §§ 1002(13), 1135, and 1136(b). That includes express authority to construe the QDRO provision, 29 U.S.C. § 1056(d)(3), in consultation with Treasury under 29 U.S.C. § 1056(d)(3)(N). Treasury also has authority to construe the anti-alienation provision. *See* Reorganization Plan No. 4 of 1978, § 101(a), 3 C.F.R. § 332 (1979).

Treasury's reasonable interpretation of a statute it enforces merits great deference. *See Long Island*

Care at Home, ___ U.S. ___, 127 S.Ct. at 2350-2351; *Boeing Co. v. United States*, 537 U.S. 437, 448 (2003). Labor's interpretation evolved between its *amicus* filing in *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), *cert. denied*, 540 U.S. 1047 (2003), and its *amicus* filing here. The Secretaries of Labor and the Treasury have harmonized their analyses so that no assignment or alienation occurs if a beneficiary waives rights without transferring them.

DuPont's analysis would wreak havoc on the Treasury's ability to enforce ERISA's anti-spendthrift provisions and Treasury's acceptance of benefit disclaimers under Sections 408, 691, and 2518(b) of the Internal Revenue Code, regulations, and state law. *See, e.g.*, General Counsel Memorandum 39,858, 1991 WL 776304 (Sept. 23, 1991); 26 C.F.R. § 2518; and 26 C.F.R. § 1.401(a)(9)-4, Q&A 4. Treasury's regulation, 26 C.F.R. § 1.401(a)-13(c)(1)(ii) ("Assignment or alienation of benefits"), reads in pertinent part as follows:

> (c) *Definition of assignment and alienation* –
>
> (1) *In general.* For purposes of this section, the terms "assignment" and "alienation" include –
>
> (ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may

> become, payable to the participant or beneficiary.

Treasury's reasonable interpretation of its regulation precludes DuPont's interpretation. *See* 29 U.S.C. § 1144(d) ("Nothing in this title shall be construed to alter . . . impair or supersede any law of the United States . . . or any rule or regulation issued under such law.").

"Arrangement" is the key word in Treasury's regulation. Since *Black's Law Dictionary* does not define this term, the Estate turns to *Webster's Third New International Dictionary* (Merriam-Webster 1993) at 120, which defines "arrangement" as "the act or action of arranging or putting in correct, convenient, or order. . . ." An "arrangement" must result in an order through which one person "acquired" property enforceable against a plan on June 2, 1994, the date of the divorce. But ex-spouse Liv did not order or systematize her property to dictate who would receive William's SIP benefits on June 2, 1994. As DuPont argues, "William could have changed his beneficiary designation at any time during the seven years between the divorce and his death . . . " Merits Response at 3. Liv could not have transferred an interest in her divorcing ex-husband's pension to anyone. DuPont did not "acquire" William's pension benefits on June 2, 1994 divorce, since ex-spouse Liv had nothing to convey on that date.

DuPont contends that Liv's waiver is an "indirect arrangement" under Treasury's regulation – an

argument the United States rejects. William Kennedy had not retired by his divorce, so he could not "acquire" benefits on that date. He was alive, so no probate estate on June 14, 1994 "acquired" benefits. DuPont cites Judge Easterbrook's suggestion in his *Fox Valley* dissent, 897 F.2d at 282-83, to suggest that a waiver is "an anticipatory gift, to whoever is next in line under the Fund's rules," but William's pension benefit would not pass until after death and, further, a gift requires a donor, donee, and transfer – which was impossible in 1994 when there was a waiver and no probate estate. Because there was no donation, no delivery and no donee on June 2, 1994, there was no "gift." *See Brown v. O'Keefe*, 300 U.S. 598, 602 (1937) (under "the law of gifts and legacies," rejection leaves the title "as if the gift had not been made.").

Contrary to DuPont's argument on page 16, Liv's waiver was not an indirect "arrangement" under the Treasury Regulation, for no one "acquired" property enforceable against the plan on June 2, 1994. The Fifth Circuit erred in holding that 1994 waiver of rights was a "direct or indirect" assignment.

In *Boggs*, this Court applied ERISA to an attempted testamentary transfer from Dorothy Boggs to her sons in a will. Dorothy bequeathed to her husband Isaac Boggs one-third of her estate, and a lifetime usufruct – equivalent to a common-law life estate – in the remaining two-thirds of Isaac Boggs' pension benefits. She bequeathed to her sons the remaining two-thirds, subject to Isaac's usufruct, disposing of her community property interest in

Isaac's undistributed pension plan benefits. Dorothy made a transfer to her sons, through her will, of her share of husband Isaac's pension benefits. It did not involve a waiver of benefits. *Boggs* does not apply to a voluntary waiver.

II. The Fifth Circuit erred in holding that ERISA's QDRO provision is the *only* way a divorcing spouse can waive an ex-spouse's pension benefits.

A. The Estate was a proper beneficiary of William Kennedy's pension benefits.

Contrary to AARP's brief at 11, the Estate is a beneficiary of William Kennedy's DuPont benefits. She appears not as a private party, but as a court-appointed executrix acting as a fiduciary for creditors. The Estate has standing to seek relief, for ERISA defines a beneficiary as a "person designated by a participant, or by terms of an employee benefit plan, who is *or may become entitled* to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added).

The Estate is a beneficiary under DuPont's SIP because the Estate may become entitled to SIP benefits. The SIP states that if "no beneficiary designation is in effect, distribution shall be made to . . . the executor or administrator of the decedent's estate." J.A. at 48. In addition, "[i]f in the opinion of the Company there is a question as to the legal right of any beneficiary to receive a distribution under the Plan, the amount in question may be paid to the

decedent's estate . . . " J.A. at 49. Ex-spouse Liv waived her rights making her beneficiary-designation ineffective. Because the beneficiary-designation on file on the decedent's date of death was legally ineffective, William Kennedy's pension benefits must be made to the Kennedy Estate.

AARP cites Internet articles and the like to argue that ordinary folks ought to know the importance of changing their ERISA-beneficiary designations. But the list of cases cited in the Estate's *certiorari* petition demonstrates that many divorcing spouses do not get the message, forget to change their forms, or run out of time before they die.

AARP cites *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365 (1990) to argue that a QDRO is the only exception to ERISA's anti-alienation statute. But *Guidry* concerned liability for a criminal penalty. Curtis Guidry had served as a trustee of one of three union pension plans before he pled guilty to stealing money from the union. While Guidry was incarcerated, two plans shackled him with a "constructive trust" that withheld benefits until he reimbursed union losses. The Tenth Circuit held that ERISA's anti-alienation provision did not preclude a constructive trust. This Court reversed, holding that the union, a creditor, was garnishing pension benefits and that it was "inappropriate to approve any generalized equitable exception either for employee malfeasance or criminal misconduct." *Guidry,* 493 U.S. at 376. A garnishment exception conflicted with ERISA's protection of the "interests of

the participants and beneficiaries of employee welfare and pension benefit plans." *Id.* at 376. This case does not involve an attempt by a non-related third party to take pension benefits from a living participant. The Estate does not seek a general exception to ERISA's spendthrift provisions for the benefit of creditors or to punish criminal misconduct, as in *Guidry*. Instead, the Estate argues that a waiver enforceable under federal common law is not a prohibited alienation or assignment.

B. William Kennedy revoked "any and all" prior beneficiary designations in favor of ex-spouse Liv on June 7, 2004, four days *after* his divorce.

On page 9 of its Response, DuPont discussed William Kennedy's post-divorce, June 7, 1994 execution of a new beneficiary-designation form:

> Several days after entry of the divorce decree, William executed a new beneficiary-designation form to make his daughter, Kari, the beneficiary of the portion of the retirement benefits that William retained under the Pension and Retirement Plan. J.A. 62. The change did not apply to the SIP.

But DuPont does not *quote* that "Company-Paid Survivor Benefits (Pre-Retirement)" form. DuPont's beneficiary-redesignation form reads:

> "The following election revokes and supersedes any and all previous designations."

J.A. at 62. Contrary to DuPont's conclusory statement, that beneficiary-change form did *not* limit its revocatory and superseding effect to one plan only. William, who signed DuPont's form a few days after his divorce, had good reason to believe that he had revoked and superseded *"any and all"* designations of ex-spouse Liv as his sole beneficiary.

If the scope of that post-divorce, June 7, 1994 revocation is unclear, all ambiguities in DuPont's ERISA plan and beneficiary designations must be construed in accord with the reasonable expectations of participant William Kennedy. *See Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 269 (4th Cir. 2002); *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556-57 (6th Cir. 1998) (*en banc*). Courts enforce the principle of *contra proferentem*, construing ambiguities against the drafter, *i.e.*, the plan, under federal common law. *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1254 (10th Cir. 2007) ("Our court has never construed the ambiguities of an ERISA plan against the beneficiary."); *Chiles v. Ceridian Corp*, 95 F.3d 1505, 1518 (10th Cir. 1996); *Lee v. Blue Cross/Blue Shield of Alab.*, 10 F.3d 1547, 1551 (11th Cir. 1994); *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1451-52 (5th Cir. 1995) (same); *Philips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 311 (7th Cir. 1992).

Any refusal to construe ambiguities against DuPont would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted, a result that would be at odds with the congressional purposes of promoting the

interests of employees and beneficiaries and protecting contractually defined benefits." *Miller*, 502 F.3d at 1254. If there is any ambiguity as to whether it revokes and supersedeas "any and all" former designations in favor of Liv, the ambiguity is construed against the drafter, DuPont. William revoked prior beneficiary designations on June 7, 1994. If a beneficiary designation form is a plan document, DuPont's plan-administrator erred by disregarding William's revocation of his pre-divorce beneficiary designations in favor of ex-spouse Liv.

C. Given her use of a QDRO to protect her interest in part of William Kennedy's DuPont benefits, ex-wife Kennedy's waiver of pension proceeds did not violate ERISA.

On page 12 of its Response, DuPont criticizes the late William Patrick Kennedy for not doing one of three different things to ensure that his SIP benefit went to someone other than ex-wife Kennedy. But the attorneys who drafted William and Liv Kennedy's 1994 divorce decree agreed that Liv would knowingly, intelligently, and expressly waive her rights to SIP benefits. There was no need for the divorcing Kennedys to submit a QDRO for the SIP benefits because no remaining proceeds were subject to property-division in divorce court. APP. 4 at 44 (district court opinion). The Fifth Circuit's decisions in *Stobnicki* and *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995) led the divorce

court judge and the Kennedy attorneys to believe that a voluntary waiver in a court-approved division of marital property would be respected rather than repudiated.

D. A flexible federal common law analysis ensures justice and fulfills the reasonable expectations of plan participants, heirs, and beneficiaries.

The Fifth Circuit's opinion undermines this Court's determination, in *Firestone,* 489 U.S. at 110, that federal courts have the power to enforce federal common law. The Fifth Circuit failed to consider 29 U.S.C. § 1104 as a whole and elevated the convenience of administrators, over ERISA's prime directive to protect the interests of participants and beneficiaries. Section 1104(a)(1) imposes a fiduciary standard on the plan administrator, requiring him to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." The *Kennedy* panel should have adhered to *Brandon* and *Stobnicki* rather than follow the Third Circuit into a quagmire.

The Fifth Circuit's new distinction between enforceable divorce-decree waivers of welfare benefits and unenforceable divorce-decree waivers of pension benefits undermines ERISA's goal of uniform regulation. The existence of two, three, or even more conflicting standards governing ERISA waivers undermine ERISA's goal of fostering "nationally uniform plan administration." *Egelhoff,* 532 U.S. at 148.

III. Enforcing voluntary waivers of ERISA benefits under federal common law will not materially increase the burdens of ERISA plan administrators.

A. This Court Declined to Grant Petitioner's Issue #2, concerning the "Plan Documents" rule, so DuPont's efforts to argue a "Plan Documents" defense fall outside the proper scope of this appeal.

As the United States observed on page 23 of its *amicus* brief, "This Court limited its grant of *certiorari* to the third question presented. . . . It thereby declined to grant review of the second question, which asked whether federal common law requires respondents to give effect to Liv Kennedy's waiver. . . ." Petitioner's second issue read as follows:

> 2. Does federal common law, as applied to Ex-Spouse Liv Kennedy's waiver of any right to receive William P. Kennedy's pension benefits in a 1994 divorce-decree, govern the judicial determination of whether DuPont's Plan Administrator wrongfully paid Mr. Kennedy's SIP benefits to his ex-spouse Liv Kennedy, as the District Court ruled, or was that court restricted to examining only DuPont's "Plan Document," that is, the late William P. Kennedy's 1974 beneficiary designation of his then-wife?

Petition at i. DuPont and its *amici* allies now seek affirmation under the "Plan Documents" defense, rather than ERISA's QDRO provision. Those "Plan

Documents" arguments fall outside this Court's grant of *certiorari,* and Petitioner objects. Deciding this case on the basis of an extra-*certiorari* issue would deny litigants to present a record of a real "Plan Documents" appeal and deprive interested parties of notice and an opportunity to file *amici* on a within-*certiorari* issue before a decision. Kennedy's briefing focuses on the issue the Fifth Circuit decided – and the one this Court asked her to brief.

B. *If* the "Plan Documents" defense is before this Court, the government's opinions about it do not command deference.

In contrast to the United States' compelling interpretation of ERISA's spendthrift and QDRO provisions, the government's opinions about "Plan Documents" on pages 22-32 of the United States' *amicus* brief do not compel this Court's deference and, furthermore, are not persuasive. The administration cites no Treasury or Labor Department rules, regulations, or opinions. That *amicus* brief, at 24-25, cites this Court's decisions and refers to common law "principles" of law, but not administrative rulemaking. "When the administrative interpretation is not based on expertise in the particular field, however, but is based on general common law principles, great deference is not required." *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292-93 (10th Cir. 1978).

The government asserts that the QDRO provisions provide "useful guidance" in interpreting ERISA, but an agency opinion that "does little more than restate the terms of the statute itself" does not merit controlling deference. *See Gonzalez v. Oregon,* 546 U.S. 243, 257 (2006). "An agency does not acquire special authority to interpret its own words when . . . it has elected merely to paraphrase the statutory language." *Id.*

The government's opinions about statutory construction cannot supersede this Court's authority to render a first-impression interpretation of a federal statute. The administration has not shown that Congress authorized its employees to offer opinions about the Plan Documents defense as Congress authorized the Secretaries of Labor and Treasury to construe ERISA's QDRO provision. Nor have those departments promulgated regulations under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706(2) (1996), after providing notice. *See United States v. Mead Corporation*, 533 U.S. 218, 226-27 (2001). Finally, if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . ." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). The administration's *amicus* views about the Plan Document defense are not entitled to deference, and, by the United States' own admission on page 23, footnote 8, fall outside this Court's *certiorari* grant.

C. *If* the "Plan Documents" defense is before this Court, neither ERISA nor DuPont defined beneficiary-designations as plan documents.

DuPont argues a "Plan Documents" defense outside the scope of this Court's *certiorari* grant. The Estate reasserts its objections but feels compelled to respond.

DuPont's arguments reflect an unarticulated assumption that always-changing beneficiary designations are "plan documents" under 29 U.S.C. §§ 1102(a)(1), 1102(b), and 1104(a)(1)(D). The assumption is unwarranted. In *McGowan*, Judge Fuentes cautioned that assumption:

> Judge Van Antwerpen's opinion reads this provision as allowing all documents filed with the Plan to govern its administration, including forms filed to designate beneficiaries. However . . . I note in passing that the governing documents could reasonably be limited to those that set forth the terms of the plan.

McGowan, 423 F.3d at 258 n.17 (dissent), referencing *McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan for U.S. Employees,* 340 F.3d 139, 143-44 (3d Cir. 2003) ("Clearly, the 'documents and instruments governing the plan' do not necessarily include all relevant documents and, in particular, do not necessarily include the plaintiff's claim file.").

ERISA's "definitions" section, 29 U.S.C. § 1002, defines plans, employees, participants, beneficiaries, and other terms, but does not define "plan documents." Nor do the Congressional findings that precede ERISA. *See* 29 U.S.C. §§ 1001 and 1001(a). To determine what are "plan documents," this Court turns to 29 U.S.C. §§ 1022-1025. The most pertinent provision, § 1024(b)(4), requires plans to provide participants and beneficiaries with "a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." The list does not include beneficiary designations. In *Hughes Salaried Retirees v. Administrator of Hughes*, 72 F.3d 686, 688 (9th Cir. 1995) (*en banc*), *cert. denied*, 517 U.S. 1189 (1996), the court held that a list of plan participants and their addresses was not an instrument "under which the plan is established or operated" under § 1024(b)(4):

> The relevant documents are those that provide individual participants with information about the plan and benefits . . . Unlike the documents specifically listed in § 1024(b)(4) . . . participants' names and addresses provide no information about the plan or benefits. As the district court said it so aptly, it would strain the meaning of "other instruments under which the plan is established or operated" to interpret it to include participant names and addresses.

Hughes, 72 F.3d at 690, *citing Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73 (1995). If beneficiary designations were "plan documents," their disclosure to anyone requesting them under 29 U.S.C. § 1024(b)(4) would subject plan beneficiaries to harassment, emotional abuse, telemarketing and other forms of solicitation. *Id.* at 694-95. Just as a plan's list of names and addresses is not a plan document, a beneficiary designation is not a plan document.

Because ERISA does not define a beneficiary designation as a plan document, a company has to give participants notice, lest a participant lack notice of what she, her beneficiaries, and her heirs stand to lose. DuPont cannot transmute its beneficiary designations into "plan documents" by slapping that label on them. DuPont's SIP did not define designations as plan documents. *See* Dkt. 40-1 at 4 and 33-67. It reads as follows:

> **PLAN DOCUMENTS**
>
> This summary plan description is intended to provide you with a reasonably thorough explanation of the Savings and Investment Plan. . . . *The official plan texts are the E.I. DuPont de Nemours and Company Savings and Investment Plan and the Trustee Agreement between the Company and the plan trustee.* These texts are the governing documents in the event questions arise.

Dkt. 40-1, p. 61 (italics supplied). Although DuPont asserts that beneficiary designations are plan documents, it did not characterize them that way for its

participants and beneficiaries. Its plan has only two governing documents: the Plan and the Trustee Agreement. None of DuPont's beneficiary designations state that they are plan documents. J.A. 34 (TRASOP); 56-57 (Thrift Plan); 62 (Survivor Benefits). DuPont's beneficiary-designation forms are not plan documents.

D. The "Plan Documents" defense rewrites ERISA's plain statutory language.

DuPont's "Plan Documents" rule, which focuses on 29 U.S.C. §§ 1102 and 1104, rewrites ERISA in defiance of traditional statutory construction rules. The first describes how ERISA plans are established, while the second imposes a "prudent man standard of care" on administrators. Neither statute addresses beneficiary-change issues. The statutes require that a plan administrator "not take actions that are inconsistent with the plan's guidelines." *McGowan,* 423 F.3d at 254 (Becker, J., concurring). "[N]othing in the language [of § 1104] prohibits the administrator from consulting other documents, insofar as those documents do not conflict with the language of the plan."

An administrator must consult other documents to determine whether a participant has obtained a valid QDRO. *Id.* "The provision authorizing QDROs explicitly states that such orders are exempt from ERISA's anti-alienation clause but says nothing whatsoever about § 1104(a)(1)(D). This suggests that Congress simply did not see a conflict between the

requirement that plan administrators perform their duties 'in accordance with the documents and instruments governing the plan' and the requirement that they give effect to a transfer of benefits pursuant to a QDRO. . . ." *Id.*; *see also* Gorris, 155 U. PA. L. REV. at 734 and nn. 100-101.

By elevating the convenience of plan administrators above their fiduciary duty to work on behalf of participants and beneficiaries, the Sixth Circuit deprived a widow of needed funds and awarded a windfall to an ex-spouse. DuPont asks this Court to absolve plan administrators for breaches of fiduciary duty in a manner Congress neither enacted nor intended.

E. The enforcement of voluntary divorce-decree waivers will not materially increase the burdens of ERISA plan administrators.

1. This case arose only because DuPont paid William Kennedy's SIP funds without regard for the Estate after ignoring repeated pleas to recognize that Liv waived her rights.

A reversal of the Fifth Circuit's decision will not require plan administrators to scrutinize every file. Administrators need only pay attention to voluntary, written, attorney-negotiated, court-approved waivers when claims are made before payout. This case went to court because a DuPont paralegal disregarded

repeated pre-lawsuit demands in which the Estate begged DuPont to enforce a valid waiver. Although aware of the circuit split concerning waivers, DuPont nevertheless gave a spendthrift ex-spouse a windfall without even attempting to protect an executor's interest. J.A. at 3, 33; Appellee's Reply Brief (07/13/2006) at 2-3. An interpleader would have protected the funds from spendthrift Liv until DuPont secured a stakeholder's discharge and recovered its fees from registry funds.

2. Administrators already have to investigate divorce decrees, QDROs, QPSAs, QJSAs, and other documents, so enforcement of voluntary waivers will not materially increase plan expenses.

DuPont argues that a plan administrator should not have to read anything but the plan to determine who is a beneficiary. But administrators always have to review documents outside the plan, *e.g.*, QDROs, QPSAs, QJSAs, marriage licenses, and death certificates. In *Fox Valley,* the Seventh Circuit explained that "no such additional burdens will be imposed because . . . a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits." *Id.*, 897 F.2d at 282; *cf. Estate of Altobelli v. IBM*, 77 F.3d 78, 81 (4th Cir. 1996).

The bright-line rule DuPont proposes is neither bright nor linear, for courts enforce QDROs liberally, not literally. In *Metropolitan Life Ins. Co. v. Wheaton*, 42 F.3d 1080 (7th Cir. 1994), Judge Posner rejected an objection that a QDRO failed to list addresses of a participant's minor sons and concluded that ERISA must be flexibly interpreted.

> It is asking too much of domestic relations lawyers and judges to expect them to dot every *i* and cross every *t* in formulating divorce decrees that have ERISA implications. . . .

Id. at 1084-85; *see also Tolstad v. Tolstad*, 527 N.W.2d 668, 671-72 (N.D. 1995) (same).

ERISA beneficiary status often depends on marital status, which changes as new laws redefine marriages and spouses. Plan administrators who hope to discharge their fiduciary duties must look beyond beneficiary designations. They must resolve complex issues about common law marriages in Alabama, Colorado, the District of Columbia, Georgia, Idaho, Iowa, Kansas, Montana, New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Common Law Marriage*, at http://www.ncsl.org/programs/cyf/commonlaw.htm (07/28/08).

Plan administrators now have to define marriage under "civil union," domestic partnership, and reciprocal-beneficiary statutes and court decisions that

give same-sex couples all or most benefits available to married opposite-sex couples. *See* CONN. GEN. STAT. § 46b-38nn (2006); D.C. LAW 16-79 (Act 16-265) (2006); HAW. REV. STAT. § 572C-2 (1997); 2004 ME. LEGIS. SERV. CH. 672 (H.P. 1152; L.D. 1579); 2001 ME. LEGIS. SERV. CH. 347 (H.P. 1256; L.D. 1703); N.H. REV. STAT. ANN. § 457-A (2007); N.J. STAT. ANN. § 37:1-29 (2006); OR. LAWS CH. 99 (2007); 15 VT. STAT. ANN. § 1201 (1999); and WASH. REV. CODE CH. 26.60 (2006). *Cf. In re Marriage Cases,* No. S147999 *et al.,* 43 Cal. 4th 757, 183 P.3d 384 (Cal. 2008); *Martinez v. Cty. of Monroe,* 2008 NY Slip Op. 909, 50 A.D.3d 189, 850 N.Y.S.2d 740 (N.Y. 2008) (not published); *Opinions of Justices to the Senate,* 802 N.E.2d 565 (Mass. 2004); *Kerrigan v. Comm'r of Public Health,* No. SC No. 17716 (Ct., argued May 14, 2007) (pending). The Defense of Marriage Act, 1 U.S.C. § 7 and 28 U.S.C. § 1738C, allows states and the United States to avoid acknowledging other states' same-sex laws, but does not tell plan administrators what marriages to recognize.

Enforcing waivers takes time. But plan administration always takes time. *McGowan,* 423 F.3d at 254-55 (J. Becker, concurring). Administrators already review QDROs, QPSAs, and "extraneous" documents such as the Estate's demand letter. J.A. 76, ¶ 20. When it enacted the "prudent man" fiduciary standard, 29 U.S.C. § 1104, Congress required plan administrators to read, think, and act.

DuPont exaggerates the risk that disputes over voluntary waivers will compel interpleader actions.

In 1996, the editor of the *ERISA Litigation Reporter* described how plan administrators resolve most waiver disputes without litigation:

> Must a plan take every purported waiver into court in order to figure out whether it applies to the beneficiary designation? We don't have a satisfying response to this objection, other than to note [that] in our own practice we have been able to solve dozens of beneficiary disputes without yet having been forced into an interpleader action.

Who Is the Payee, Part VIII: Altobelli v. IBM and the Other Beneficiary Waiver Cases, ERISA LITIG. REPTR. 14, 17 (Aug. 1996); Gorris, 155 U. PA. L. REV. at 735 n. 107. Most claimants will voluntarily divide disputed benefits and then notify the plan of their settlement. Courts can then enforce such a settlement. *Stobnicki,* 868 F.2d at 1465.

3. Interpleaders enable administrators to recover plan attorneys' fees.

The district court correctly concluded that "an interpleader action would have been the best and most efficient means for resolving this dispute in the first place." Pet. at APP. 26. *See also* Timothy J. Snyder, *Supreme Court rules that ERISA preempts state laws on beneficiary designations,* DELAWARE EMPLOYMENT LAW LETTER (June 4, 2001) ("Generally, our advice would be to "interplead" the funds. . . . you as the employer will be entitled to your attorneys' fees and the costs of preparing and filing the interpleader

complaint and sending notice. . . ."); Editor, Employee Benefits Institute of America's EBIA WEEKLY, at http://www.ebia.com/WeeklyArchives/401k/CourtCases/16275 (07/27/2008) (same).

DuPont could have deposited William's SIP funds into a federal or Texas court registry, moved for discharge, and recovered its attorneys' fees. "Under the common law, a stakeholder is entitled to recover its attorneys fees from the deposited funds unless there were no rival claimants or the interpleader was unreasonably delayed." *State Farm Life Ins. Co. v. Martinez,* 216 S.W.3d 799, 803 (Tex. 2007) (a beneficiary-designation dispute). *See also* William V. Dorsaneo, TEXAS LITIGATION GUIDE § 22 (Matthew Bender 2008); 28 U.S.C. § 2361.

On pages 12-14 of its brief, the Western Conference of Teamsters Pension Trust Fund complained that administrators do not always recover every penny of their fees. But courts routinely award such fees to stakeholders. "Compensable expenses include preparing the complaint, obtaining service of process on the claimants to the fund, and preparing an order discharging the stakeholder from liability and dismissing it from the action." *Trustees of Directors Guild of America-Producer Pension Benefits Plans v. Tise,* 234 F.3d 415, 427 (9th Cir. 2000); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 1719 & n. 20 (1986). Efficient interpleaders recover *all* fees. *Rhoades v. Casey,* 196 F.3d 592, 595 (5th Cir. 1999), *rhg. & rhg. en banc*

denied, 209 F.3d 721 (5th Cir. 2000), *cert. denied,* 531 U.S. 924 (2000) (affirming a $23,955.21 award).

Fee-recovery problems result from poorly-drafted plans; unwise litigation; and client-deficient senior partners in tall building law firms who do not use form-files. Western Conference cited one such example: *First Trust Corp. v. Bryant,* 410 F.3d 842 (6th Cir. 2005). "Had First Trust properly followed the interpleader procedures, sued in the proper venue, and impleaded all of the claimants of which it was aware, as it was legally obligated to do, it would not have gotten entangled in the litigation." *Id.* at 851. A beneficiary who defeats a rival beneficiary can recover attorneys' fees against a culpable party, such as an ex-spouse who voluntarily waived her rights. 29 U.S.C. § 1132(g)(1). This Court's opinion can direct district courts to reimburse plan administrators who file proper interpleaders and for claimants who prevail in them.

F. A state court suit against Liv Kennedy would have been pointless.

DuPont and several *amici* argue that the Estate should have sued ex-spouse Liv in state court under a contractual or equitable claim to recover pension benefits – but only *after* DuPont paid Liv. The Estate sued Liv for breach of contract, R., Dkt. 24, but DuPont argued that "[c]laims of breach of contract under state law are clearly pre-empted by ERISA." R., Dkt. 40 at 27 and Dkt. 41. The law does not require a

"useless ceremony." *Cheney v. Libby,* 134 U.S. 68, 81 (1890). Suing Liv after DuPont paid was useless. DuPont's payments were a windfall to Liv, who had "forgotten all about the account," but soon spent $402,000.00 on a Norwegian smorgasbord of excess. J.A. at 58-59.

A plan administrator can preserve a beneficiary's right to recover disputed funds by filing an interpleader to recover reasonable fees, make the plan whole, and ensure that a recipient does not squander windfall benefits. DuPont *chose* to crusade for a Plan Documents Rule at its plan's expense, elevating financial interests over fiduciary duties to participants and beneficiaries. DuPont forced the Estate to enforce Liv's voluntary waiver under federal common law.

CONCLUSION

Petitioner Kari Ellen Kennedy, Independent Executrix of the Estate of William Kennedy, requests this Court to REVERSE the August 15, 2007 decision of the Fifth Circuit and to REINSTATE the October 5, 2005 judgment of the Eastern District of Texas. Alternatively, the Estate asks this Court to REVERSE and REMAND for a new trial.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

No. 07-636

In the Supreme Court of the United States

KARI ELLEN KENNEDY, PETITIONER,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

By order dated October 28, 2008, the Court directed the parties to file supplemental briefs addressing the following question: "whether 29 U.S.C. § 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar."

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E. I. du Pont de Nemours and Company is a publicly held corporation. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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INTRODUCTION AND SUMMARY OF ARGUMENT

ERISA requires that covered employee benefit plans must be administered in accordance with the terms of the documents governing the plan, including those governing a participant's beneficiary designation. *See* 29 U.S.C. §§ 1101(a), 1102(a)(1), 1102(b)(4), 1104(a)(1)(D); *see also* § 1101(a). Here, William designated Liv as his beneficiary under the Savings and Investment Plan and – although he could have done so by submitting a simple form during the seven years between the Kennedys' divorce and his death – he never revoked that designation. Thus, Liv was the designated beneficiary under the SIP at William's death. Furthermore, although the Plan's terms required it to pay benefits pursuant to a QDRO, it is undisputed that the Kennedys' divorce decree was a non-qualified order.

Accordingly, if the Plan had paid William's account balance to his estate pursuant to the purported waiver in the divorce decree, rather than to Liv as his designated beneficiary, it would have violated the terms of the Plan. Moreover, because the statute requires that benefits be paid to the designated beneficiary, there is no gap for courts to fill in by creating federal common law directing payment to anyone else. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989); U.S. Am Br. 28-29. The United States and AARP, American Benefits Council (joined by the ERISA Industry Committee and the National Association of Manufacturers), and Western Conference of Teamsters Pension Trust Fund support this conclusion.

ARGUMENT

BECAUSE ERISA REQUIRES THAT A PLAN BE ADMINISTERED AND BENEFITS DETERMINED IN ACCORDANCE WITH THE PLAN DOCUMENTS, THE PLAN WAS OBLIGATED TO PAY WILLIAM'S ACCOUNT BALANCE TO LIV AS HIS DESIGNATED BENEFICIARY.

I. ERISA PLANS MUST BE ADMINISTERED IN ACCORDANCE WITH THE PLAN DOCUMENTS.

A. ERISA Requires That Benefits Be Paid To Beneficiaries Determined Pursuant To The Plan Documents.

ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." § 1102(a)(1). The plan must "specify the basis on which [benefit] payments are made . . . from the plan" (§ 1102(b)(4)), and the administrator must make payments to the "'beneficiary' . . . designated by a participant, or by the terms of . . . [the] plan" (§ 1002(8)). Furthermore, the plan must hold its assets for the exclusive purpose of providing benefits to participants and beneficiaries (as well as defraying reasonable administrative expenses). § 1103(c). Finally, a plan administrator, acting as a fiduciary, must "discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]." § 1104(a)(1)(D). *See* George A. Norwood, *Who Is Entitled*

to Receive a Deceased Participant's ERISA Retirement Plan Benefits – an Ex-Spouse or Current Spouse?, 33 GONZ. L. REV. 61, 72-74 (1997/1998).

Accordingly, this Court has recognized that plans must distribute benefits in accordance with the governing plan documents. *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 147-148 (2001); *Boggs v. Boggs*, 520 U.S. 833, 845-846 (1997); *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). *See also Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541, 546 (7th Cir. 1997), *cert. denied*, 523 U.S. 1073 (1998).

The "plan documents" requirement serves two principal purposes.

1. First, it protects the interests of participants and beneficiaries. It ensures "that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 514 U.S. at 83, quoting H.R. Rep. No. 93-1280, at 297 (1974). "[T]he payment of benefits . . . [is] a central matter of plan administration" (*Egelhoff*, 532 U.S. at 148) and the ERISA "scheme . . . is built around reliance on the face of plan documents" (*Curtiss-Wright*, 514 U.S. at 83). Thus, the "plan documents" requirement ensures that rightful beneficiaries are correctly determined and promptly paid. *See* 2 Daniel C. Knickerbocker, EMPLOYEE BENEFITS GUIDE § 24.15, at 24-51 to 24-53 (2008).

2. Second, the "plan documents" requirement "enables plan administrators . . . [to] manage the plan on a day-to-day level" in a practical and efficient manner.

Curtiss-Wright, 514 U.S. at 82. This is "[o]ne of the principal goals of ERISA" (*Egelhoff*, 532 U.S. at 148), and "[t]he most efficient way [for a plan] to meet [its] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

The legislative history reflects this congressional policy. Congress recognized that employee benefit plans are not mandatory but rather are optional at the election of the employer. *See* H.R. Rep. No. 93-533, at 1, 9 (1973). Concerned that the costs of administering employee benefit plans could deter the establishment and growth of such plans, Congress sought to "strike a balance between providing meaningful reform and keeping costs within reasonable limits." H.R. Rep. No. 93-807, at 15 (1974). Congress therefore "weighed carefully the additional costs to the employers and minimized these costs to the extent consistent with minimum standards for retirement benefits." H.R. Rep. No. 93-779, at 2 (1974). *See Beck v. Pace Int'l Union*, 127 S. Ct. 2310, 2314 (2007) (benefit plans are voluntary); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) (there is a "'public interest in encouraging the formation of employee benefit plans'") (citation omitted).

This Court has recognized "the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators." *Egelhoff*, 532 U.S. at 149-50 (citation omitted). *See also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1027 (2008) (Roberts, C.J., concurring). Congress thus had

"competing purposes": the "desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497. *See also Mertens*, 508 U.S. at 262-63.

The "plan documents" requirement enables administrators to "make payments simply by identifying the beneficiary specified in the plan documents." *Egelhoff*, 532 U.S. at 148. "Pension plans are high-volume operations" and "rely heavily on forms, such as designations of beneficiaries." *Blue v. UAL Corp.*, 160 F.3d 383, 386 (7th Cir. 1998). Furthermore, administrators typically are not lawyers, and the pension system could not effectively operate if advice of counsel routinely had to be sought to process claims. *See Boggs*, 520 U.S. at 853 ("Congress could not have intended that pension benefits from pension plans would be given to accountants and attorneys" to administer). *See also* Norwood, *supra*, at 79-80. Thus, the "plan documents" requirement enables administrators to pay benefits – efficiently, promptly, consistently, and correctly – in accordance with the documents establishing the plan.

In sum, Congress understood that efficiency and administrability are critical to the sound operation of the pension system. *See Egelhoff*, 532 U.S. at 149 n.3 (referring to ERISA's central "objective of efficient plan administration"). ERISA provides "unyielding rules" rather than "flexible standards" to be applied to the particular facts and circumstances of each individual case. *Fox Valley & Vicinity Constr. Workers Pension*

Fund v. Brown, 897 F.2d 275, 283-84 (7th Cir.) (en banc) (Easterbrook, J., dissenting), *cert. denied*, 498 U.S. 820 (1990). "Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules." *Id* at 283.[1]

B. Payment Of Pension Benefits In Accordance With A QDRO But Not A Non-Qualified Order Is Required By The "Plan Documents" Provisions.

Contrary to petitioner's contention (*see* Pet. Reply Br. 28), the payment of pension benefits pursuant to a QDRO, but not pursuant to a non-qualified domestic relations order, is required by ERISA's "plan documents" provisions. Indeed, ERISA expressly provides that "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order" (§ 1056(d)(3)(A)), and the SIP so provides. *See* SIP, p. 48 (D.I. 33, Ex. 15, D0088). Because plans must provide for payment in accordance with QDROs, administrators are complying with rather than departing from the plan when benefits are paid pursuant to a QDRO. *See Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1121 (10th Cir.), *cert. denied*, 502 U.S. 1020 (1991).

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[1] Furthermore, as this Court has explained, the costs of expense, delay, and uncertainty are "ultimately borne by the beneficiaries." *Egelhoff*, 532 U.S. at 150.

These QDRO provisions promote the same congressional policy of efficiency, simplicity, and consistency as the "plan documents" requirement. The language, history, and purposes of the QDRO provisions are discussed in respondents' opening brief. *See* Resp. Br. 29-32, 51-52. In basing the QDRO provisions on objective criteria that are easily applied by plan administrators, Congress sought to minimize the burden on plans and eliminate uncertainty by requiring that administrators be furnished, in the order itself, with the statutorily enumerated information necessary to determine whether the order is "qualified." *See* Resp. Br. 30-31; *Hamilton v. Washington State Plumbing & Pipefitting Indus. Pension Plan*, 433 F.3d 1091, 1096-97 (9th Cir.), *cert. denied*, 127 S. Ct. 86 (2006); *Carland*, 935 F.2d at 1122.[2]

Furthermore, ERISA contemplates that any order the parties intend to be a QDRO be submitted to the plan administrator to determine whether it is "qualified." *See* § 1056(d)(3)(G)(i)(II); *Hamilton*, 433 F.3d at 1097 & n.7; *Dorn v. Int'l Bhd. of Elec. Workers*, 211 F.3d 938, 942, 943-44 (5th Cir. 2000); *Fox Valley*, 897 F.2d at 783 (Easterbrook, J., dissenting); U.S. Am. Br. 26. Like the "plan documents" requirement, the QDRO provisions

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[2] Petitioner's reliance (Pet. Reply Br. 29) on cases treating orders as qualified if they substantially comply with ERISA is misplaced; here, the divorce decree was never intended to be a QDRO and did not come close to meeting the statutory requirements.

ensure that the plan "is on notice of its exact obligations." *Hamilton*, 433 F.3d at 1097.[3]

II. THE DECISIONS THAT HAVE RECOGNIZED COMMON-LAW WAIVERS CONTRARY TO PLAN DOCUMENTS ARE INCORRECT.

The Sixth and Second Circuits, and the Michigan Supreme Court, have correctly held that beneficiaries must be determined pursuant to ERISA's "plan documents" requirement rather than the theory of waiver under federal common law. *See Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415, 420-21 (6th Cir. 1997); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-16 (2d Cir. 1993); *Sweebe v. Sweebe*, 712 N.W.2d 708, 711-14 (Mich. 2006). *See also McGowan*, 423 F.3d at 244-48 (opinion of Van Antwerpen, J.); *Estate of Altobelli v. International Bus. Machines Corp.*, 77 F.3d 78, 82 (4th Cir. 1996) (Wilkinson, C.J., dissenting); *Fox Valley*, 897 F.2d at 282-83 (Easterbrook, J., dissenting), 284 (Ripple, J., dissenting); *Strong v. Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 331 (Neb. 2005) (Connolly, J., dissenting); *Keen v. Weaver*, 121 S.W.3d 721, 728 (Tex.) (Hecht, J., dissenting), *cert. denied*, 540 U.S. 1047 (2003); Norwood, *supra*, at 72-102.

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[3] As a practical matter, a QDRO submitted to and approved by the plan is a plan document. *See McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 246 (3d Cir. 2005) (opinion of Van Antwerpen, J.), *cert. denied*, 127 S. Ct. 1118 (2007); *Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting); *Silber v. Silber*, 786 N.E.2d 1263, 1267 (N.Y.), *cert. denied*, 540 U.S. 817 (2003); U.S. Am. Br. 25. But regardless of whether a QDRO is a plan document, payment of benefits in accordance with a QDRO is mandated by the plan documents and thus complies with the "plan documents" requirement.

Admittedly, a majority of courts have held that a plan must give effect to a waiver of benefits in a non-qualified divorce decree under federal common law rather than to the participant's beneficiary designation made in accordance with the plan documents. *See* Pet. Br. 31-32 (collecting cases). These decisions, however, do not withstand scrutiny.

> [N]ot one of the courts in the majority has explained why the statutory analysis used by these courts adopting the plan-documents rule is flawed. . . . Because the waiver rule is based, at best, on throwaway, conclusory statements rather than a careful analysis of statutory language, . . . the fact that a majority of cases have adopted it is entitled to little weight.

Strong, 701 N.W.2d at 331 (Connolly, J., dissenting).

Courts holding that plans must give effect to a purported waiver that is contrary to the terms of the plan documents have reasoned that (1) ERISA's QDRO provisions already require administrators to go beyond plan documents in determining benefits, and (2) requiring administrators to recognize non-qualified divorce decrees imposes no greater burden than the QDRO provisions already impose. Both parts of this analysis are badly mistaken.

First, as explained above, payment of benefits under a QDRO is consistent with the "plan documents" requirement. *See* pages 6-8, *supra*. When benefits are paid pursuant to a QDRO, the administrator is following, not violating or going beyond, the plan's terms.

These courts also are wrong in concluding that non-qualified orders are no more burdensome than qualified orders for plan administrators to follow. It is vastly easier to interpret and implement orders that are submitted to the administrator for review under the plan's procedures to determine whether they satisfy ERISA's objective QDRO requirements than it is to handle orders that are not subject to a uniform legal standard, vary widely in content and form, and might not be submitted until after benefits have been paid to the designated beneficiary. Indeed, as explained above, a principal objective of the QDRO provisions is to *minimize* the burdens on plans. *See* pages 7-8, *supra*; *McGowan*, 423 F.3d at 247; U.S. Am. Br. 28. Furthermore, Congress itself, in enacting the QDRO provisions, recognized the enormous differences between qualified and non-qualified orders and purposely required plans to give effect only to QDROs precisely to avoid the immeasurably greater burdens that non-qualified orders would impose on plans. *See* page 7, *supra*; Resp. Br. 30-32; *Altobelli*, 77 F.3d at 83 (Wilkinson, C.J., dissenting) ("Congress was concerned with the very problems that face us here when it defined the requirements to establish a QDRO, and it took pains to ensure that enforcement of QDROs would not produce inefficiency and uncertainty").

Moreover, the common-law approach urged by petitioner is highly fact intensive and subjective and thus unworkable in practice. Unlike the simple procedure Congress contemplated, it would require a time-consuming, costly, and speculative process of interpreting non-qualified decrees. Congress never intended to require plan administrators to resolve

factual questions such as the voluntariness and good faith of the divorcing parties' agreement to a purported waiver, the particular circumstances of their divorce, and the ex-spouses' post-divorce relationship. Accordingly, petitioner's common-law approach would not lead to readily determinable and consistent results. The existing case law demonstrates these problems.

First, as the United States discusses, the common-law approach would require plan administrators "to decide among the 'myriad of tests' courts have developed to determine whether language in a domestic relations order is sufficient to constitute a valid waiver." U.S. Am. Br. 27 (citation omitted). For example, in the Fifth Circuit, the standard is whether "the waiver is explicit, voluntary, and made in good faith." *Manning v. Hayes*, 212 F.3d 866, 874 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). On its face, that standard requires intensely factual and subjective inquiries. This case well illustrates the difficulty. Here, the divorce decree uses the term "divested"; nowhere does the word "waived" appear even though waiver is the linchpin of petitioner's argument. It would be extraordinarily burdensome and ultimately impossible for a plan administrator reliably to determine whether the divorcing parties' choice of this language has any significance.

Similarly, as the government explains, the common-law approach leads to unpredictable and "inconsistent interpretations" (U.S. Am. Br. 28) with "substantially similar language being treated differently" (*id.* at 27 n.9). In this case, for instance, the Kennedys' divorce decree does not specifically refer to Liv's right to SIP death benefits and did not preclude William from

maintaining Liv as his beneficiary after the divorce. *See also* page 17, *infra*. Although the district court concluded that Liv nonetheless waived those benefits (*see* Pet. App. 31-52), the Eighth Circuit has held that indistinguishable language in a divorce decree did not waive death benefits under federal common law. *See Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693-94 (8th Cir. 1989). There, the decree provided that the ex-husband "shall have as his own, free and clear of any interest of [his ex-wife], the interest in the profit-sharing plan." The court ruled that the decree did not waive the ex-wife's right to death benefits because it did not "specifically refer to and modify the beneficiary interest." Such inconsistencies are inevitable under petitioner's common-law approach.

The fact-intensive and unpredictable nature of the common-law approach is further illustrated by the Eighth Circuit's decisions in *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir.), *cert. denied*, 516 U.S. 868 (1995), and *National Auto. Dealers and Assocs. Retirement Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996). Although the language in the two decrees was substantially similar (*see* 89 F.3d at 501), the court came to opposite results based on the facts of each case.

In *Mohamed*, the ex-husband was seriously ill, and the ex-wife "could not get away fast enough, and she never looked back . . . [and] abandoned him to his illness." 53 F.3d at 916. Furthermore, "[o]nce the divorce was final all ties between [the ex-spouses] were severed." *Id.* Based on "the facts surrounding the Kerrs' divorce" and their post-divorce relationship (*id.*), the Eighth Circuit reached the "fact-driven determination"

(*id.* at 915) that the divorce decree waived death benefits under federal common law.

By contrast, in *National Auto. Dealers*, the Eighth Circuit concluded that similar language did not constitute a waiver. There, the ex-spouses "'maintained an amicable relationship'" and the ex-husband "provided more support to [the ex-wife] . . . than he was legally obligated to provide." 89 F.3d at 501. Based on those facts, the court distinguished *Mohamed* as involving "a vastly different situation" *Id.*

These divergent results, and the underlying fact-intensive and subjective common-law inquiries, are irreconcilable with ERISA's fundamental design to have a simple, efficient, and administrable benefits system. In enacting the "plan documents" requirement, Congress intended that benefit decisions would be made pursuant to a bright-line and objective standard that could be easily and consistently applied by plan administrators.

Accordingly, ERISA forecloses the analysis of those courts that have followed federal common law rather than the plan documents. ERISA's "clear statutory command, together with the plan provisions, answer the question; the documents control, and those name [the ex-wife]." *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990). *See also Altobelli*, 77 F.3d at 82 (Wilkinson, C.J., dissenting). As then-Chief Judge Wilkinson observed, "[w]hat seem like small equitable steps in a particular case may lead to large administrative headaches in the aggregate." *Id.* at 84.

III. UNDER ERISA'S "PLAN DOCUMENTS" REQUIREMENT, THE PLAN COULD NOT GIVE EFFECT TO LIV'S PURPORTED WAIVER IN THE DIVORCE DECREE AND HAD TO PAY WILLIAM'S ACCOUNT BALANCE TO LIV AS WILLIAM'S DESIGNATED BENEFICIARY.

A. The Plan Documents Made Liv The Designated Beneficiary And Required The Plan To Pay Her.

Under the terms of the SIP, the Plan could not follow Liv's purported waiver in the non-qualified divorce decree. Instead, it was required to pay William's account balance to Liv as William's designated beneficiary.

The SIP documents are clear and not disputed by petitioner. The SIP entitled each participant to "designate any beneficiary or beneficiaries he chooses to receive all or part of his interests . . . in case of his death." J.A. 48. The SIP also allowed him to "replace or revoke such designation." *Id.* Any designation, replacement, or revocation had to be made in the manner prescribed by the Plan (*id.* at 52), which supplied forms for such purposes (*id.* at 34, 56-57). Furthermore, the Plan stated that "distribution shall be made to . . . the executor . . . of the decedent's estate" only "*[i]f* no surviving spouse exists and *no beneficiary designation is in effect.*" *Id.* at 48 (emphasis added).[4]

[4] Petitioner suggests that William's designation of Liv was not "in effect" because of the purported waiver in the divorce decree. *See* Transcript of Oral Argument 10-11 (Oct. 7, 2008) ("Tr."). That is a circular word game. The "plan documents" requirement serves precisely to avoid the burdens and uncertainties that would occur if administrators had to look beyond plan documents to determine whether non-plan documents indicate a different beneficiary.

Moreover, the SIP provided a mechanism for Liv to disclaim her right to benefits by filing a qualified disclaimer under 26 U.S.C. § 2518. *See* J.A. 50. However, as previously explained, and as petitioner does not contest, the purported waiver in the Kennedys' divorce decree is not a qualified disclaimer because it involved consideration. *See* Resp. Br. 21-23.

The Summary Plan Description also set forth the rules for paying benefits upon the participant's death. The SPD stated that death benefits would be paid to the designated beneficiary: "If you die before receiving your SIP account balances, your beneficiary(ies) will receive the balance in your accounts." J.A. 43. *See also* SPD, p. 22 (D.I. 40, Ex. C, D0027) ("[g]enerally, plan benefits may be paid only . . . to your beneficiaries or survivors"). The SPD further explained that "an exception to this may be made as a result of a qualified domestic relations order." *Id.* It therefore was clear that death benefits would be paid to the designated beneficiary unless a QDRO provided otherwise.

Thus, following the divorce, William was the "master of his own ERISA plan." *McMillan*, 913 F.2d at 312. And, although William lived for seven years after the divorce, he never changed his SIP beneficiary designation. He did, however, make a post-divorce change in his beneficiary designation under the separate Pension and Retirement Plan and hence was aware of his right to make such a change and the simple process for doing so. *See* Resp. Br. 9; page 16, *infra*.

Accordingly, the applicable plan documents obligated the SIP to pay William's account balance to Liv as his designated beneficiary. *See McMillan*, 913 F.2d at 312 ("it was [the participant's] designation which controls, not [his ex-wife's] intent").

B. Petitioner's Remaining Arguments Are Without Merit.

1. Petitioner asserts that the form William submitted to designate Kari as his beneficiary for the Pension and Retirement Plan also made her his beneficiary under the SIP. *See* Pet. Reply Br. 16-17; Tr. 7-8. In both its title and its body, however, this form plainly stated that it applied to "the Pension and Retirement Plan" (J.A. 62) – not the SIP. What is more, petitioner *stipulated* in the district court that William "never executed any forms or documents to remove or replace Liv Kennedy as his sole beneficiary under . . . the SIP." J.A. 28. *See also* Pet. App. 3 (William "never executed any documents replacing or removing Liv Kennedy as the SIP beneficiary"). Moreover, under this argument, Kari would be the beneficiary and thus was required to file suit in her individual capacity rather than as executrix of William's estate. Petitioner's eleventh-hour about-face is both procedurally and substantively unavailing.

2. Petitioner also argues that William and Liv intended in their 1994 divorce that Liv would not receive the death benefits under the Plan. *See* Tr. 8. This is both irrelevant and unsubstantiated.

It is irrelevant because the identity of the beneficiary cannot turn on the intentions of the divorcing parties. *See* Resp. Br. 38-39. As explained above, a fact-intensive inquiry into the divorcing parties' state of mind would be incompatible with the simple, efficient, and easily administrable process Congress intended. *See* pages 3-6, *supra*.

It is unsubstantiated because it cannot now be known what William and Liv intended in their divorce. The divorce decree itself does not answer that question. It left the decision to William, but nothing prevented him from maintaining Liv as his beneficiary following the divorce. In fact, there are a number of cases where that occurred. *See* Resp. Br. 38 & n.11.

All that can be said with any certainty is that William's thoughts subsequent to the divorce cannot now be known and that there are several possible explanations for not changing the designated SIP beneficiary, including the possibility that he wanted Liv to receive the benefits upon his death. That Liv had no right to them following the divorce did not in any way prohibit William from maintaining her as the beneficiary or reveal anything about his post-divorce intentions. Beneficiaries would not be able to determine their rights, and plans would not be administrable, if benefits turned on such a speculative will-o'-the wisp.

3. Finally, petitioner asserts that the beneficiary designation form is not a plan document. *See* Pet. Reply Br. 23; Tr. 20. Once again, that is irrelevant.

It is clear – and petitioner has never argued otherwise – that the SIP is a plan document and provides that benefits be paid to the beneficiary properly designated in accordance with the terms of the Plan. Thus, whether or not the form itself is a plan document, the Plan requires that payment be made to the designated beneficiary, and payment to anyone else would violate the "plan documents" requirement. *See* Tr. 26.[5]

Petitioner further argues that the Summary Plan Description (mistakenly referred to as the SIP) defined the plan documents and did not include beneficiary designation forms. *See* Pet. Reply Br. 25; Tr. 56. Nothing in the SPD, however, changed the plan requirement that benefits be paid to the designated beneficiary. Moreover, the SPD did precisely what it was supposed to do: it fairly described itself as a "reasonably thorough" and "non-technical" explanation, and it referred participants to the official plan texts of the SIP and the trustee agreement as "the governing documents in the event questions arise." SPD, p. 24 (D.I. 40, Ex. C., D0029).[6]

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[5] Contrary to petitioner's argument (*see* Pet. Reply Br. 23), just as a QDRO is effectively a plan document, the beneficiary designation form also should be considered a plan document for purposes of the payment of benefits. *See* page 8 note 3, *supra*. The plan makes this the controlling document for benefit payments, and it is submitted to and maintained by the plan for that purpose. *See* Norwood, *supra*, at 74-77.

[6] Petitioner also asserts (Pet. Reply Br. 24-25; Tr. 21) that a ruling for respondents would require that beneficiary designation forms be disclosed to all participants under § 1024(b)(4). That issue has not been adequately briefed and is outside the scope of this case. For present purposes, it is sufficient to note that courts have recognized limits under § 1024(b)(4) (*see, e.g., Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139

(Cont'd)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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(Cont'd)

(2d Cir. 1997)) and that petitioner's construction of the statute to require that each participant's designation form be disclosed to all participants is nonsensical.

SUPPLEMENTAL BRIEF

No. 07-636

In The Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

versus

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEFING CONCERNING 29 U.S.C. § 1104(a)(1)(D)

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QUESTION PRESENTED FOR REVIEW

Whether 29 U.S.C. § 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar?

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SUMMARY OF ARGUMENT

The "documents and instruments governing" a plan under ERISA's "prudent man" standard of care statute, 29 U.S.C. § 1104(a)(1)(D), do not include beneficiary designations. That statute did not require DuPont's Plan Administrator to pay Liv Kennedy benefits she knowingly, voluntarily, and expressly waived. The clear, unambiguous waiver in Liv's divorce decree was in the Plan Administrator's file *before* payout. The federal common law precedent of most courts, and the collective wisdom of 45 legislatures, recognizes that divorced spouses do not knowingly enrich ex-spouses to the detriment of children. So should this Court.

The "Plan Documents" defense rewrites ERISA. A designation is not a "document or instrument governing" DuPont's 401k Plan under a plain-meaning interpretation of § 1104(a)(1)(D). Ever-changing beneficiary designations are not among the "documents" and "instruments" governing a plan in 29 U.S.C. §§ 1022-1026.

Neither DuPont's designations nor its Plan Summary gave notice of a "Plan Documents" Rule that precludes challenges based on waiver and the traditional rule that wrongdoers must not profit by wrongdoing. DuPont's rule would reward murderous children and spouses who slay plan-participant parents and spouses; incentivize fraud during negotiations; and undermine regulations governing gifts, disclaimers, and taxes.

Although DuPont argues that only lawyers can determine whether a waiver is voluntary, the contrary is true. Millions of times every year, hundreds of thousands of non-lawyer police officers, deputies, constables, and justices of the peace decide whether a suspect's waiver of *Miranda* rights is knowing and voluntary. Waivers of jury trials, appeals, and liability as well as medical consent waivers, are part of everyday life.

Judicial extension of a "Plan Documents" Rule to include designations would conflict with specific, later-enacted ERISA provisions controlling the form and payment of benefits. Such a deviation from traditional statutory interpretation would decrease respect for the legitimacy of all law. It would deny courts their ERISA-mandated role of creating a federal common law of benefits where judges act on the basis of all available evidence. It would eviscerate a uniform concept of voluntary waiver based on RESTATEMENT (SECOND) OF CONTRACTS § 84 comment b. It would privatize law, replacing federal statutory uniformity with a confusing collection of conflicting "plan document" designations clouded by plan administrator conflicts of interest. Such an approach would multiply litigation and render a uniform approach to ERISA impossible.

ARGUMENT

I. The SIP beneficiary designation Liv Kennedy waived was not a "document or instrument governing" DuPont's Plan under the plain meaning of 29 U.S.C. § 1104(a)(1)(D).

A. While ERISA's "prudent man" standard of care imposes traditional, common law trust fiduciary duties on administrators, it does not mandate that they ignore express, voluntary waivers of benefits.

DuPont asserts that its "Plan Documents" interpretation of 29 U.S.C. § 1104(a)(1)(D) mandates that courts ignore a divorcing spouse's voluntary, written, attorney-negotiated, court-approved waiver of pension benefits in a property settlement agreement if that waiver conflicts with a beneficiary designation "plan document." DuPont is wrong: beneficiary designations are not "plan documents" that "govern" plans.

1. 29 U.S.C. § 1104(a)(1)(D) is a fiduciary-duty law, not a beneficiary determination law.

A plain-meaning interpretation governs § 1104(a)(1)(D), just as it governs § 1056(d)(3)'s QDRO statute. The statute reads as follows:

§ 1104 Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 USC §§ 1103(c), 1103(d), 1342, and 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries:

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Are beneficiary designations "documents and instruments governing the plan"? They are not.

Provisions governing payment of benefits appear in Subchapter 1, Subtitle B, Part 2, "Participation and Vesting." Section 1104(a)(1)(D) is in Subtitle B, Part 4's laws about "Fiduciary Responsibility." The "fiduciary duties" and "prudent man standard of care" headings in Section 1104(a)(1)(D) are signboards that "aid in resolving an ambiguity in the legislation's text." *INS v. Nat'l Center for Immigrants' Rights,* 502 U.S. 183, 189 (1991).

Section 1104(a)(1)'s "prudent man standard" arose under the common law of trusts. It addresses financial/investment matters. A provision immediately

preceding Section 1104(a) – 29 U.S.C. § 1104(a)(1)(B) – dictates that a fiduciary shall discharge ERISA responsibilities "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Subsections address IRAs, rollovers, and plan terminations – financial, not beneficiary, issues. The terms "beneficiary," "designation," and "waiver" are not found in Section 1104, however.

DuPont's "Plan Documents" Rule conflicts with provisions that expressly authorize payments to persons not on designations. A plan administrator presented with a QDRO and a demand to transfer benefits to a child or ex-spouse must pay the alternate payee designated in the QDRO rather than the beneficiary designated. And a designated beneficiary spouse with a joint and survivor annuity may waive entitlement to those benefits under 29 U.S.C. § 1055(c)(1)(A).

Pre-ERISA courts did not bar waivers or disclaimers of spendthrift trust benefits, but, instead, upheld those waivers. *See Brown v. Routzahn,* 63 F.2d 914, 917 (6th Cir.), *cert. denied,* 290 U.S. 641 (1933) (recipient's renunciation of inheritance did not constitute a transfer). Under federal law prior to ERISA, a beneficiary under a will or trust was under no obligation to accept a legacy or gift. *U.S. v. McCrackin,* 189 F.Supp. 632, 634-37 (S.D. Ohio 1960) (holding that a son's disclaimer/waiver was valid); Lawrence

Newman and Albert Kalter, *The Need for Disclaimer Legislation – An Analysis of the Background and Current Law,* 28 TAX LAWYER 571 (1975); and the Kennedy Merits Brief at 19-21. Extension of the "Plan Documents" Rule to include designations elevates administrators above participants and beneficiaries in violation of 29 U.S.C. § 1104(a)(1)(A)(i).

Congress did not end federal common law waiver by codifying, in 29 U.S.C. § 1104(a)(1), the "prudent man standard of care" from the law of trusts. "[I]t would be surprising, indeed," if Congress had affected a "radical" change in the law "*sub silentio*" via "technical and conforming amendments." *Director of Revenue of Mo. v. CoBank, ACB,* 531 U.S. 316, 323 (2001). "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection,* 474 U.S. 494, 501 (1986); *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 266-67 (1979).

When Congress wants to bar waivers, it knows how to do so – expressly rather than impliedly through something as gossamer-thin as the "Plan Documents" doctrine. The Securities Act of 1933 and the Securities Exchange Act of 1934 expressly declare waivers to be void, 15 U.S.C. § 77n and § 78bb. But ERISA contains no similar bar. Without an express statutory ban, this Court has no reason to rule that Congress barred waivers *sub silentio.* "Congress...does not alter the fundamental details of a

regulatory scheme in vague terms or ancillary provisions – it does not...hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances....").

Other ERISA provisions, 29 U.S.C. §§ 1054-1056, govern accrual and payment of pension benefits. The Qualified Joint and Survivor Annuity ("QJSA") statute, 29 U.S.C. § 1055, provides a spouse with an annuity benefit. The statute controlling payment of benefits is not 29 U.S.C. § 1104(a)(1)(D) but § 1056, which addresses disputes about Domestic Relations Orders ("DROs") that "provide" (pay, supply, or transfer) benefits for "child support, alimony payments, or marital property to a spouse, former spouse, child, or other dependent of a participant."[1] Neither 29 U.S.C.

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[1] Congress was *precise* in crafting benefit payments language. *See*, 29 U.S.C. §§ 1056(d)(1) (barring alienation of benefits "provided" to others, *i.e.*, supplied or paid); 1056(d)(3)(B)(ii) (defining a DRO as "any judgment, decree, or order (including approval of a property settlement agreement) which (I) relates to the *provision* of child support, alimony payments, or marital property rights...") (emphasis supplied)); 1056(d)(3)(G) (payments to alternate payees); 1056(d)(3)(H) (segregation into separate accounts of money payable to an alternate payee "[d]uring any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise)..."); 1056(d)(3)(K) (defining a DRO

(Continued on following page)

§ 1056(d) nor § 1104(a)(1)(D) applies here because Liv's waiver did not result in participant William's "provision," payment, or transfer of SIP benefits to her. The specific, later-enacted terms of a statute override general, earlier-enacted terms. *U.S. v. Estate of Romani*, 523 U.S. 517, 532 (1998); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957). ERISA's accrual, QJSA, and QDRO laws, 29 U.S.C. §§ 1054-1056, specifically govern the accrual and payment of benefits – not 29 U.S.C. § 1104(a)(1)(D).

2. Beneficiary designations do not "govern" a plan.

In *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3d Cir. 2005), *cert. denied*, 547 U.S. 1017 (2006), Judge Fuentes cautioned that,

> Judge Van Antwerpen's opinion reads this provision as allowing all documents filed with the Plan to govern its administration, including forms filed to designate beneficiaries. However...I note in passing that the governing documents could reasonably be limited to those that set forth the terms of the plan.

"alternate payee" as a person "having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.").

Id. at 258 n.17 (dissent), referencing *McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan for U.S. Employees*, 340 F.3d 139, 143-44 (3d Cir. 2003).

The critical terms in Section 1104(a)(1)(D) are "documents and instruments" and "governing." A leading dictionary defines "governing document" under "Document," subset "Governing Document." *See* Bryan A. Garner (ed.), *Black's Law Dictionary* (8th ed. 2004) at 520 and 715. *Black's* defines a "governing document" as "[a] document that defines or organizes an organization, or grants or establishes its authority and governance." *Id.* at 520. "An organization's governing documents may include a charter, articles of incorporation or association, a constitution, bylaws, and rules..." That comports with 29 U.S.C. § 1102, which defines "instrument" by stating that every plan "shall be established and maintained pursuant to a written instrument."

An ERISA "plan" instrument governs a plan by "establish[ing] and maintain[ing]" it. Designations do neither. The prudent-man standard, 29 U.S.C. § 1104(a), of which Subsection (1)(D) is a part, imposes fiduciary duties on financial and investment decision-makers. It does not direct or distribute pension benefits. Other provisions – 29 U.S.C. §§ 1054-1056 – specifically do so. ERISA's "definitions" section, 29 U.S.C. § 1002, defines terms but not "plan instruments." To determine what documents and instruments govern a plan, this Court turns to 29 U.S.C. §§ 1022-1025 under Subtitle B, "Regulatory

Provisions," where the same language appears. *See Ratzlaf v. United States,* 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

The most relevant statute, § 1024, governs the "Filing and Furnishing of Information." Subsection (a)(6) requires public filing of "any *documents* relating to the employee benefit plan, including but not limited to, the latest summary plan description...and the bargaining agreement, trust agreement, contract, *or other instrument under which the plan is established or operated.*" (Emphasis supplied). Documents and instruments "governing" a plan are those "under which the plan is established or operated," 29 U.S.C. § 1024(b)(4):

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description[,] and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or *other instruments under which the plan is established or operated....*

(Emphasis supplied). Section 1024's enumeration of governing documents and instruments does *not* include designations. In *Hughes Salaried Retirees v. Administrator of Hughes,* 72 F.3d 686, 688 (9th Cir. 1995) (*en banc*), *cert. denied,* 517 U.S. 1189 (1996), the court held that a list of plan participants was not an instrument "under which the plan is established or operated":

> The relevant documents are those that provide individual participants with information about the plan and benefits...Unlike the documents specifically listed in § 1024(b)(4)...participants' names and addresses provide no information about the plan or benefits. As the district court said it so aptly, it would strain the meaning of "other instruments under which the plan is established or operated" to interpret it to include participant names and addresses.

Hughes, 72 F.3d at 690, *citing Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). If a list of participant names is not a "document or instrument governing" a plan, neither is a designation.

Even DuPont did not view its beneficiary designations as "Plan Documents." DuPont's Plan Summary reads:

> **PLAN DOCUMENTS**
>
> This summary plan description is intended to provide you with a reasonably thorough explanation of the Savings and Investment Plan....*The official plan texts are the E.I. DuPont de Nemours and Company Savings and Investment Plan and the Trustee Agreement between the Company and the plan trustee.* These texts are the *governing documents* in the event questions arise.

Dkt. 40-1, p. 61 (italics supplied). DuPont stated that the only "governing documents" – a variation on the terms in §§ 1104(a)(1)(D) and 1024(b)(4) – were its

plan and trustee agreement, but not beneficiary designations. And none of DuPont's designations state that they are plan documents. J.A. 34 (TRA-SOP); 56-57 (Thrift Plan); 62 (Survivor Benefits).

If this Court holds that designations are "plan documents," administrators will then have to disclose them to any participant or beneficiary who can afford a postage stamp. *See* 29 U.S.C. § 1024(b)(4) (an administrator "shall, upon written request of any participant or beneficiary, furnish a copy of...*instruments under which the plan is established or operated.*") (emphasis supplied); 29 U.S.C. § 1025(a) (an administrator shall furnish to "any beneficiary who so requests in writing" *inter alia,* "the total benefits accrued..."). Disclosing designations to everyone in the line of succession would subject participants and beneficiaries to harassment, emotional abuse and manipulation, and telemarketing. *Hughes,* 72 F.3d at 694-95. A participant's child who received no response to such a benefits letter will demand to become a beneficiary. The potential for family discord is obvious.

3. Neither ERISA nor DuPont's Plan Summary warns participants and beneficiaries that beneficiary designations are un-waivable.

Because ERISA does not define a designation as a "plan document," a plan must give participants and beneficiaries notice that the plan precludes waiver,

ambiguity, incapacity, and other challenges to designations. Under 29 U.S.C. § 1022(b), ERISA mandates disclosure of "the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits..." DuPont did not give notice to William Kennedy that a beneficiary designation, once made, could never be waived or challenged. *See* J.A. 43-45, 48-50, 56-57, 62-63.

Review of an ERISA payment does not end with a plan's governing documents. "We agree with the Court of Appeals that trust documents cannot excuse trustees from their duties under ERISA, and that trust documents must generally be construed in light of ERISA's policies, *see* 29 U.S.C. § 1104(a)(1)(D)..." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport,* 472 U.S. 559, 568 (1985). Under the common law of trusts, "[a] trustee is...expected to 'investigate the identity of the beneficiary when the trust documents do not clearly fix such party.'" *Id.* at 572 (citing George R. Bogert & George T. Bogert, *Law of Trusts and Trustees* § 583, p. 348-49, n.40 (2d rev. ed. 1980)). DuPont's proposed rule would excuse plan-administrators who choose to ignore waivers and elevate their convenience of administrators above their fiduciary duty to examine claims submitted on behalf of beneficiaries.

If a plan's drafters fail to expressly warn participants and beneficiaries that the plan will never

respect a waiver or disclaimer of pension benefits, no plan administrator can later deprive a participant's executor or heirs of the inheritance they have every right to expect. Here, DuPont failed to give the notice necessary to enforce even its "Plan Documents" Rule.

B. The most well-reasoned decisions reject DuPont's notion that 29 U.S.C. § 1104(a)(1)(D) precludes courts from recognizing waivers.

"The plan-documents rule...is the minority rule. A majority of courts have concluded that 29 U.S.C. § 1104(a)(1)(D) does not govern the issue..." *Strong v. Omaha Constr. Indus. Pension Plan,* 270 Neb. 1, 8, 701 N.W.2d 320, 327 (2005). In *Manning v. Hayes,* 212 F.3d 866 (5th Cir. 2000), the Fifth Circuit rejected the notion that § 1104(a)(1)(D) had created a "Plan Documents" Rule precluding challenges under the judge-made, federal common law of ERISA:

> Section 1104 defines the fiduciary duties owed by the plan administrator to plan participants and beneficiaries. That section does not either expressly or implicitly purport to establish any methodology for determining the beneficiary of an ERISA plan or for resolving competing claims to insurance proceeds. Thus, considered in isolation, § 1104(d) is a very thin reed upon which to find complete conflict preemption with respect to competing claims to life insurance proceeds....[T]he Sixth Circuit's bright line rule that a beneficiary designation cannot be

> challenged would supplant what is a fairly uniform set of state laws providing that a named beneficiary who kills a plan participant in order to obtain the plan benefits is not entitled to recover those proceeds...ERISA is broad enough in its preemptive scope....There is no additional need to breathe imaginary preemptive effect with respect to competing claims for life insurance benefits into general provisions addressing another topic altogether.

Manning, 212 F.3d at 872.

DuPont's "Plan Documents" Rule would run roughshod over the collective wisdom of countless courts and at least 45 legislatures that have recognized that the vast majority of people do not choose to enrich ex-spouses at the expense of their children and other heirs. *See* Kennedy Merits Brief at 59-63. Since this Court considers the number of states banning same-sex intimacy and enforcing the death penalty in constitutional cases, this Court should also consider the collective wisdom of 45 legislatures when determining federal common law. *See, e.g., Manning*, 212 F.3d at 871. Disputes between beneficiaries arise because divorcing spouses reasonably place their trust in the enforceability of the express, written waivers their spouses sign in court – decisions approved of for decades by a large majority of this nation's courts. Continued recognition of a waiver rule under the federal common law – rather than repudiation of long-standing ERISA waiver precedent – comports with this Court's presumption favoring

the continuation of judge-made law. *Midlantic,* 474 U.S. at 501.

Rejection of DuPont's proposed "Plan Documents" Rule would not conflict with *Egelhoff v. Egelhoff,* 532 U.S. 141, 147-48 (2001) and *Boggs v. Boggs,* 520 U.S. 833 (1997), where state statutes overrode plan beneficiary-status. Neither case concerned a knowing, voluntary waiver of a beneficiary designation under federal common law.

II. Application of DuPont's "Plan Documents" Rule to beneficiary designations would result in absurd and adverse consequences.

A. Treating beneficiary designations as "Plan Documents" when they are not, and precluding federal common law enforcement of voluntary, written waivers, conflicts with Congress' effort to create a uniform, federal common law of ERISA including judicial consideration of all relevant evidence.

DuPont's "Plan Documents" Rule, which trumps a voluntary, written waiver, would thwart ERISA's policy of fostering a uniform, federal common law of ERISA. This Court can create a uniform federal ERISA rule of waiver consistent with dozens of this Court's decisions by holding that a party enforcing an express waiver in a written divorce decree or property settlement must prove "a voluntary relinquishment of

a known right" under RESTATEMENT OF CONTRACTS (SECOND) § 84 comment b (1981).

The Restatement's rule of voluntary waiver is simple and clear. Judicial enactment of DuPont's "Plan Documents" Rule would replace such a uniform national standard with a welter of thousands of conflicting "plan document" approaches, increasing administrator uncertainty while multiplying costly litigation at the expense of plans, participants, and beneficiaries.

Real world plan administrators can never limit their gaze solely to beneficiary designations. To carry out their fiduciary duties, they must always examine QDROs, QPSAs, QJSA spousal-consent forms, birth and death certificates, adoption papers, common law marriage affidavits, and the statutes and precedent of states recognizing same sex marriages and unions. *See* Kennedy Reply Brief at 28-31.

DuPont justifies its "Plan Documents" Rule on the grounds that only lawyers can determine whether a waiver is voluntary. DuPont ignores real world waivers. Hundreds of thousands of non-lawyers – *e.g.*, police officers, deputies, constables, and justices of the peace – decide whether a suspect's waiver of *Miranda* rights is knowing and voluntary millions of times a year. Nurses and hospital personnel decide whether a patient seeking medical care has voluntarily waived rights through consent forms. Waivers of jury trial are common place.

Judicial repudiation of waivers based solely on the penumbra of 29 U.S.C. § 1104(a)(1)(D) would undermine respect for waivers under federal law – including ERISA-related waivers of liability incidental to medical care, the exercise of HIPAA privacy rights, and the receipt of COBRA insurance payments.

Precluding judicial review of beneficiary designations would incentivize divorcing spouses to commit fraud during settlement negotiations. Unscrupulous attorneys would have reason to encourage a divorcing client to sign a waiver to secure desired property, while suggesting that the client later cheat, retreat, and repudiate the waiver.

Given the clarity of Liv's and William Kennedy's agreement about Liv's waiver of all right, title, interest in and claim to William's 401k benefits at DuPont, William's elimination of Liv as beneficiary in the one DuPont plan not covered by the divorce decree or the one QDRO both divorces executed, and the absence of any remarriage, there is no reasonable doubt that William expected Liv to waive any claim to his 401k benefits. *See* Kennedy Merits Brief at 40-43. Long-established precedent requires enforcement of beneficiary designations in accord with the reasonable expectations of the participant. *See Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 269 (4th Cir. 2002).

DuPont's proposed rule would privatize ERISA's payment provisions without congressional authorization and delegate vast, largely-unchecked power to administrators. A decision focusing solely on a beneficiary designation would deprive courts of their traditional power to render justice based on all relevant evidence.

Must future courts ignore ambiguous "plan documents" or designations that confuse or confound participants, beneficiaries, and judges? What if the boxer George Foreman – all of whose five sons are named George Foreman – identifies "George Foreman" as his sole beneficiary without specifying which George should receive his benefits?

What if the participant designates his lawyer as his sole beneficiary, at the expense of his minor children? Does the "Plan Documents" Rule preclude a court from invalidating a designation based on self-dealing?

How about spouse-slayers and parricides? Does the slayer profit merely because his name appears on a designation?

Must a court stand mute while a plan-administrator pays pension proceeds to someone who is incompetent or *non compos mentis* beneficiary?

DuPont's expansion of the Plan Documents Rule to beneficiary designations would wreak havoc on the Treasury's acceptance of disclaimers and waivers under Section 2518(b) of the Internal Revenue Code,

Treasury's regulations, and state law. *See* I.R.S. GEN. COUNSEL MEM. 39,858, 1991 WL 776304 (Sept. 23, 1991); United States' *Amicus* Brief at 18. DuPont's rule subordinates waivers and disclaimers to plan "documents" Congress never defined as such while denying those who rely on waivers meaningful judicial review.

B. DuPont's "Plan Documents" Rule would reward children and spouses who slay their participant parents and spouses.

By precluding any challenge to an on-file beneficiary designation, DuPont's "Plan Documents" Rule would preclude courts from exercising their federal common law power to deny benefits to children and spouses who murder participant parents and spouses. *Keen v. Weaver,* 121 S.W.3d 721, 726 n.4 (Tex. 2003). *See* Kennedy Merits-Brief at 60-63. It is difficult to believe that the 1974 Congress that enacted ERISA – a Congress highly critical of corporate power, the Vietnam War, and President Nixon – created a "Plan Documents" statute that so radically recast trust, probate, and estate law without expressly signaling that intent.

III. DuPont's Plan Administrator breached the Plan's 29 U.S.C. § 1104(a)(1)(B) fiduciary duty to the Estate by failing to consider the divorce decree waiver, despite DuPont's prepayment receipt and maintenance of those papers as "a record of DuPont with regard to the SIP account...with other DuPont records relating to Mr. Kennedy's SIP account...."

If the "Plan Documents" Rule ensures that a plan has all relevant papers necessary to make a benefits-determination, the Estate satisfied that purpose here. DuPont's Plan Administrator, Mary Dineen, had everything a reasonable person would need under 29 U.S.C. § 1104(a)(1)(B) to recognize a dispute between contending beneficiaries. Ms. Dineen failed to consider the voluntary waiver in the Kennedy divorce decree, despite her receipt of the Estate's demand letter and its copy of that divorce decree. She was "not qualified to provide a legal interpretation" as a non-lawyer, she testified, and was "not authorized to secure a legal interpretation from any legal service or law firm other than the DuPont Legal Department." J.A. at 73. Ms. Dineen never stated that she had asked the DuPont Legal Department benefits lawyer for an opinion.

Ms. Dineen swore that she maintained those papers as "a record of DuPont with regard to the SIP account...with other DuPont records relating to Mr. Kennedy's SIP account...." She failed to recognize conflicting claims or file the interpleader most

administrators would have filed. *See* Kennedy Reply Brief at 31-33; *Atwater v. Nortel Networks, Inc.*, 388 F.Supp.2d 610, 616 (M.D. N.C. 2005) (administrator liability for paying proceeds to a participant's husband after his indictment for her murder but prior to his conviction); *Metro. Life Ins. Co. v. Hamm*, 2003 U.S. Dist. LEXIS 19839, 2003 WL 22518183, *5 (E.D. Pa. 2003) (an interpleader action was appropriate although the slayer-beneficiary had "not been arrested, formally charged, or convicted of homicide"); *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436, 442 (2d Cir. 2002) (allowing interpleader to determine the proper beneficiaries).

By doing what was merely "convenient" rather than what was right, DuPont's Plan Administrator wrongfully paid pension benefits to an ex-spouse who had voluntarily and expressly waived them in court.

CONCLUSION

Petitioner Kari Kennedy, Independent Executrix of the Estate of William Kennedy, requests this Court to REVERSE the August 15, 2007 decision of the Fifth Circuit and to REINSTATE the October 5, 2005 judgment of the Eastern District of Texas.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

No. 07-636

In the Supreme Court of the United States

KARI E. KENNEDY, PETITIONER

v.

PLAN ADMINISTRATOR FOR
DUPONT SAVINGS AND INVESTMENT PLAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

By order dated October 28, 2008, the Court directed the parties and permitted amici to file briefs addressing the following question: "Whether 29 U.S.C. 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar." As the government explained in its amicus brief (at 22-32), Section 1104(a)(1)(D) required the plan administrator in this case to pay benefits to Liv Kennedy, as the designated beneficiary of William Kennedy.

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires an employee benefit plan to "specify the basis on which pay-

ments are made to and from the plan," 29 U.S.C. 1102(b)(4), and requires a plan administrator to administer the plan "for the exclusive purpose" of "providing benefits to participants and their beneficiaries," 29 U.S.C. 1104(a)(1)(A), "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D). This Court has recognized that the obligation to administer a plan in accordance with plan documents includes the obligation to distribute benefits to a "beneficiary," a term defined in 29 U.S.C. 1002(8) to mean a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." See *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001); see also *Boggs* v. *Boggs*, 520 U.S. 833, 844-851 (1997).

The so-called plan documents rule serves important statutory interests. It promotes certainty for both plan participants and beneficiaries, thereby "enabl[ing] beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995). And it facilitates plan administration. The statutory rule that administrators administer plans in accordance with plan documents "minimiz[es] the administrative and financial burden[s] on plan administrators," and allows them to discharge their duties quickly and efficiently. *Egelhoff*, 532 U.S. at 149-150 (internal quotation marks and citation omitted).

2. The DuPont Savings and Investment Plan (SIP) at issue in this case contained several provisions specifying the basis on which payments were to be made to beneficiaries. The SIP provided that a participant could "designate any beneficiary or beneficiaries he chooses to receive all or part of his interests * * * in case of his death," as well as to "replace or revoke such

designation." J.A. 48. It provided that any designations had to be made "in the manner prescribed by the Company," J.A. 52, and the plan administrator provided forms for purposes of making and altering beneficiary designations. See, *e.g.*, J.A. 34, 56-57. Consistent with those provisions of the plan itself, the Summary Plan Description stated: "If you die before receiving your SIP account balances, your beneficiary(ies) will receive the balance in your accounts." J.A. 43. The plan itself and the Summary Plan Description are "documents and instruments governing the plan" under 29 U.S.C. 1104(a)(1)(D). See *Schoonejongen*, 514 U.S. at 83-84 (explaining that ERISA gives effect to the written plan documents scheme through a comprehensive set of reporting and disclosure requirements that includes obligations under 29 U.S.C. 1024(b)(2) and (4) to make available governing plan documents); 29 U.S.C. 1024(b)(2) (such documents include the summary plan description and the "bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated"); 29 U.S.C. 1024(b)(4) (similar).

In accordance with the plan's terms, William Kennedy signed a beneficiary-designation form naming his then-wife Liv Kennedy as his sole beneficiary for the SIP, and a second form naming Liv Kennedy as his sole beneficiary for another plan that would later merge into the SIP. J.A. 27-28; see Pet. App. 2, 32-33. The Kennedys divorced in 1994. *Id.* at 2. Although William Kennedy later submitted a new form designating his daughter, Kari Kennedy, as his beneficiary for the DuPont Pension and Retirement Plan, thereby revoking any previous designations, J.A. 62, he never revoked his des-

ignation of Liv Kennedy as his beneficiary for the SIP, Pet. App. 3.

Petitioner argues (Reply Br. 23-26) that William Kennedy's beneficiary designation is not controlling because neither ERISA nor DuPont defined beneficiary designations as plan documents. But whether a beneficiary-designation form itself is one of the "documents and instruments governing the plan" under Section 1104(a)(1)(D) is irrelevant. Petitioner does not dispute that the SIP and the Summary Plan Description *are* plan documents, see 29 U.S.C. 1024(b)(2) and (4), and those documents made clear that the plan administrator would pay benefits to a participant's designated beneficiary, and that any changes to the participant's beneficiary designation had to be made in the manner prescribed by the plan. Thus, when William Kennedy died in 2001, the plan documents required the plan administrator to distribute the balance in his account to Liv Kennedy, as William Kennedy's designated beneficiary. Pet. App. 3, 33.

3. Petitioner's primary contention is that, instead of distributing benefits in accordance with the plan documents, the plan administrator should have given effect to a state-court divorce decree that awarded to William Kennedy, and simultaneously divested Liv Kennedy of, "all right, title, interest, and claim" to, *inter alia*, William Kennedy's pension plan benefits. Pet. App. 64-65. According to petitioner (Pet. Br. 17), by consenting to that division of property, Liv Kennedy effectively waived her beneficiary interest in any SIP benefits payable with respect to William Kennedy. Petitioner argues (Pet. Br. 14-15, 47-52) that, as a matter of federal common law, the plan administrator was required to enforce Liv Kennedy's divorce-decree waiver—even though, because William Kennedy never revoked his earlier ben-

eficiary designation, Liv Kennedy remained William Kennedy's sole beneficiary for the SIP.[1]

Petitioner's argument rests on the premise that, in the absence of a provision in ERISA that specifically addresses waivers by a beneficiary, courts may fill that supposed gap by requiring plan administrators to give effect to beneficiary waivers as a matter of federal common law. See Pet. Br. 12-13 (citing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989)). As petitioner notes, a number of courts of appeals and state supreme courts have endorsed that proposition. See Pet. Br. 31-33 (citing cases). The premise is, however, flawed. A rule that required plan administrators to recognize a waiver contained in a state-court divorce decree, even when the participant has not taken the steps necessary to effectuate the waiver, would allow the state-court decree to trump the beneficiary designated according to the plan. It therefore would conflict with the plan administrator's duties under ERISA. As this Court has explained, "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted); see also *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 831-832 (2003).

This Court has previously rejected rules that would require plan administrators to pay ERISA plan benefits to persons other than those designated as beneficiaries in accordance with plan terms. In *Boggs*, the Court held that ERISA preempted application of state community

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[1] As the government noted in its amicus brief (at 30), the SIP did provide for qualified tax disclaimers under 26 U.S.C. 2518. J.A. 50. Petitioner does not, however, contend that Liv Kennedy disclaimed her right to receive benefits in a manner that complied with Section 2518.

property laws insofar as they permitted a nonparticipant spouse to transfer, by will, an asserted community-property interest in undistributed pension plan benefits. 520 U.S. at 848-851. The Court reasoned that such an application of state law was inconsistent with the principle that pension plan benefits are to be paid only to beneficiaries designated either by the participant or under the terms of the plan, and would effectively "create a new class of persons for whom plan assets are to be held and administered." *Id.* at 850. ERISA, the Court concluded, "is not amenable to this sweeping extratextual extension." *Ibid.*

Later, in *Egelhoff*, the Court held that ERISA preempted, as applied to ERISA pension plan benefits, a state statute providing that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce. 532 U.S. at 143. The Court reasoned that the state statute, which would forbid plan administrators from "mak[ing] payments simply by identifying the beneficiary specified by the plan documents," created a "direct[] conflict[] with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Id.* at 148, 150; see *id.* at 147 n.1 (identifying "the conflict between the plan documents (which require making payments to the named beneficiary) and the statute (which requires making payments to someone else)"). Further, the Court noted, the state statute would undermine ERISA's aim of "nationally uniform plan administration" and impose substantial burdens on plan administrators. *Id.* at 148; see *id.* at 146-150.

Similar principles apply here. Although petitioner seeks to distinguish *Egelhoff* and *Boggs* on the ground that the question in those cases concerned whether

ERISA preempts "one of fifty different [state] statutes," as opposed to the development of a federal-common-law rule, Pet. Br. 16, the common-law rule she urges creates no less of a conflict with ERISA's command that plan administrators distribute benefits to individuals who are "beneficiaries," in accordance with plan terms.

The federal-common-law rule petitioner proposes would also undermine the principles of certainty and plan administrability that underlie that command. Such a common-law rule requires plan administrators to "examine a multitude of external documents that might purport to affect the dispensation of benefits," *Estate of Altobelli* v. *IBM*, 77 F.3d 78, 82-83 (4th Cir. 1996) (Wilkinson, J., dissenting), and to decide among the "myriad of tests" courts have developed to determine whether language in a domestic relations order is sufficient to constitute a valid waiver, *Strong* v. *Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 332 (Neb. 2005) (Connolly, J., dissenting); see U.S. Amicus Br. at 27 n.9 (citing cases). In some instances, it would be difficult if not impossible to determine the parties' intent. See West. Conference Teamsters Amicus Br. 14-16. Evaluating waivers would delay the payment of benefits to designated beneficiaries. Resp. Br. 38. And plan administrators would inevitably be drawn, as the plan administrator was in this case, see Pet. App. 41-43, into litigation regarding whether language in a divorce decree constituted a knowing and voluntary waiver of a beneficiary interest in pension plan benefits.

Requiring plan administrators to undertake such a review also would create a risk of inconsistent interpretations of identical divorce decrees, thus undermining the interest in nationally uniform plan administration, see *Egelhoff*, 532 U.S. at 148, as well as a substantial

"risk of litigation and administrative burdens." *McGowan* v. *NJR Serv. Corp.*, 423 F.3d 241, 247 (3d Cir. 2005) (opinion of Van Antwerpen, J.), cert. denied, 127 S. Ct. 1118 (2007). By contrast, adherence to ERISA's statutory directive that plan administrators pay benefits only to persons authorized to receive them under the terms of the plan avoids that result. See, *e.g.*, *McMillan* v. *Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) ("If the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary, thus avoiding expensive litigation."); *Fox Valley & Vicinity Constr. Workers Pension Fund* v. *Brown*, 897 F.2d 275, 283 (7th Cir.) (Easterbrook, J., dissenting) ("Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules."), cert. denied, 498 U.S. 820 (1990).

As Amicus AARP explains, ERISA provides a simple method for a plan participant to eliminate a divorcing spouse's interest in pension plan benefits: participants can "review their beneficiary designations when they experience a life change such as marriage, divorce or widowhood, and * * * follow the terms of their plan to make any changes, as they see fit." AARP Amicus Br. 12; see also U.S. Amicus Br. 28. ERISA leaves no room for courts to fashion the federal-common-law rule petitioner urges.

4. Seeking to minimize the conflict between her proposed federal-common-law rule and Section 1104(a)(1)(D), petitioner notes (Reply Br. 26-27, 28) that ERISA expressly requires plan administrators to give effect to certain external documents, such as qualified domestic relations orders (QDROs) under 29 U.S.C.

1056(d)(3). In petitioner's view, the QDRO provision "suggests that Congress simply did not see a conflict" with Section 1104(a)(1)(D). Reply Br. 26-27. But as we have explained (U.S. Amicus Br. 25-26), that is because Congress was careful, in enacting the QDRO provision, to provide numerous safeguards that minimize the burden on the plan administrator and that ultimately treat the terms of the QDRO as if they were part of the plan itself and treat the alternate payee under the QDRO as a beneficiary under the plan. See 29 U.S.C. 1056(d)(3)(A) ("Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order."); 29 U.S.C. 1056(d)(3)(G) (the plan administrator must decide whether a domestic relations order is qualified, based on specific statutory criteria); 29 U.S.C. 1056(d)(3)(J) ("A person who is an alternate payee under a qualified domestic relations order shall be considered * * * a beneficiary under the plan."). Thus, contrary to petitioner's contention, the QDRO provision demonstrates a continuing commitment to the principle that a plan administrator must pay benefits, and administer the plan, according to plan documents. See *Boggs*, 520 U.S. at 847 (in enacting the QDRO provision, Congress was careful to "conform[] entitlements to benefits with participant or beneficiary status"). Petitioner's proposal, by contrast, would be fashioned by the courts, not Congress, and it would require the payment of benefits to someone who is *not* a beneficiary under the plan.

Petitioner also suggests (Reply Br. 28-31) that, to comply with the spousal protection provisions of 29 U.S.C. 1055, plan administrators must undertake difficult inquiries into marital status. But when plan administrators undertake such inquiries, they do so to *effectu-*

ate the terms of the plan and of the statute, not to override them. See 29 U.S.C. 1055(a) and (b)(1)(C)(i) (requiring plans to provide for certain spousal protections); cf. J.A. 43-44 (SIP Summary Plan Description).[2] And inquiring whether a plan participant has a "spouse" entitled to the protections of Section 1055 is generally far less burdensome than inquiring whether a former spouse has made a sufficiently clear, knowing, and voluntary waiver of beneficiary rights as part of a divorce settlement.

5. Petitioner argues (Reply Br. 16-18) that William Kennedy's estate is a beneficiary under the SIP because William Kennedy's change of beneficiary for another DuPont plan should be construed to remove Liv Kennedy as the beneficiary on the SIP plan. Petitioner did not present that argument to the court of appeals, and the court of appeals accordingly did not address it. This Court should decline to address the argument in the first instance. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998). In any event, petitioner stipulated in the district court that William Kennedy "never executed any forms or documents to remove or replace Liv Kennedy as his sole beneficiary under either the SIP or [a plan that merged into the SIP]." J.A. 28. The designation that William Kennedy filled out

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[2] Courts of appeals have recognized that a plan administrator may, in certain circumstances, have to consider external documents to determine whether the plan's terms have been met. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Johnson*, 297 F.3d 558, 567-568 (7th Cir. 2002) (considering whether participant substantially complied with instructions on changing a beneficiary). At least one court has also concluded that 29 U.S.C. 1104(a)(1)(D) does not preclude consideration of whether a beneficiary designation results from fraud or undue influence. *Tinsley* v. *General Motors Corp.*, 227 F.3d 700, 704 & n.1 (6th Cir. 2000). Neither of those factual scenarios is present here.

for another plan is limited to that plan. The plan administrator was not required to construe it as a designation for the SIP. See J.A. 62.

6. Finally, contrary to petitioner's suggestion (Reply Br. 33-34), just as the terms of the divorce decree cannot be given effect as a "waiver" under a rule of *federal* common law, neither could the waiver be enforced as a matter of *state* law in a suit against the designated beneficiary after the benefits have been paid out. Because the "waiver" does not trump the designation under the plan, the assets paid out by the plan belong to the beneficiary as a matter of federal law.

* * * * *

For the foregoing reasons and those stated in our amicus brief, the judgment of the court of appeals should be affirmed on the ground that 29 U.S.C. 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy.

Respectfully submitted.

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NOVEMBER 2008

AMICUS CURIAE BRIEF

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QUESTION PRESENTED

The Court granted certiorari limited to the following question:

Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits under ERISA?

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In the Supreme Court of the United States

No. 07-636

KARI E. KENNEDY, PETITIONER

v.

PLAN ADMINISTRATOR FOR
DUPONT SAVINGS AND INVESTMENT PLAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

INTEREST OF THE UNITED STATES

This case presents the question whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, as amended, requires a pension plan administrator to recognize designated beneficiaries' waivers of their rights to receive their ex-spouses' pension benefits when there is no qualified domestic relations order (QDRO), as defined in ERISA, 29 U.S.C. 1056(d)(3), designating an alternate payee. The Secretary of Labor has primary rulemaking and enforcement authority under Title I of ERISA, see 29 U.S.C. 1002(13), 1135, 1136(b), and specific authority to construe ERISA's QDRO provision, 29 U.S.C. 1056(d)(3), which is an exception to ERISA's prohibition

against the assignment or alienation of pension benefits, in consultation with the Secretary of the Treasury, see 29 U.S.C. 1056(d)(3)(N). The Secretary of the Treasury has authority to construe the anti-alienation provision, see Reorg. Plan No. 4 of 1978, § 101(a), 3 C.F.R. 332 (1979), and has promulgated a regulation implementing that provision, 26 C.F.R. 1.401(a)-13(c)(1).

STATEMENT

1. ERISA governs the payment of benefits under employee benefit plans. It requires every plan to be established and maintained pursuant to a written instrument and to have named fiduciaries who have authority to control and manage the operation and administration of the plan. 29 U.S.C. 1102(a)(1). A plan must specify, among other things, the basis on which payments are made to and from the plan. 29 U.S.C. 1102(b)(4). A fiduciary must discharge his or her duties with respect to a plan "for the exclusive purpose" of "providing benefits to participants and their beneficiaries" and defraying reasonable plan expenses. 29 U.S.C. 1104(a)(1)(A). A "participant" is an "employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit." 29 U.S.C. 1002(7). A "beneficiary" is a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. 1002(8). In carrying out his or her duties, a plan fiduciary must act in accordance with the documents and instruments governing the plan, insofar as they are consistent with the provisions of ERISA. 29 U.S.C. 1104(a)(1)(D).

If an employee benefit plan is a pension plan as defined in 29 U.S.C. 1002(2), it must further "provide that

benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). ERISA provides that the anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except [it] shall not apply if the order is determined to be a qualified domestic relations order." 29 U.S.C. 1056(d)(3)(A). A domestic relations order is a state-law judgment, decree, or order "relat[ing] to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." 29 U.S.C. 1056(d)(3)(B)(ii). A qualified domestic relations order (QDRO) is a domestic relations order that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," and that meets other specified requirements. 29 U.S.C. 1056(d)(3)(B)(i). An "alternate payee" is "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." 29 U.S.C. 1056(d)(3)(K). If the plan administrator determines that a domestic relations order is a QDRO, a person who is an alternate payee under the QDRO is "considered * * * a beneficiary under the plan." 29 U.S.C. 1056(d)(3)(G) and (J).

2. During his employment with E.I. DuPont de Nemours & Co. (DuPont), William Kennedy was a participant in a pension plan called the Savings and Investment Plan (SIP). Pet. App. 2, 32. In 1974, he signed a beneficiary-designation form identifying Liv Kennedy, his spouse at the time, as his sole beneficiary under that

plan. In 1980, he signed a beneficiary-designation form to the same effect for another plan that later merged into the SIP. *Id.* at 2, 32-33.

The Kennedys divorced in 1994. Pet. App. 2, 33. The divorce decree awarded to Liv Kennedy a portion of William Kennedy's retirement benefits in another DuPont plan, pursuant to a QDRO. Pet. App. 62. The decree also awarded to William Kennedy, and simultaneously divested Liv Kennedy of, "all right, title, interest, and claim" to, *inter alia*, all rights related to William Kennedy's pension plans, except for the portion awarded to Liv Kennedy. *Id.* at 64-65; see *id.* at 2, 41. The Kennedys, each of whom was represented by counsel, both signed the divorce decree. *Id.* at 75. In 1997, the divorce court issued an amended QDRO to create and recognize Liv Kennedy's interest as an alternate payee in a plan called the DuPont Pension and Retirement Plan. *Id.* at 53-59; see *id.* at 2-3. No QDRO for the SIP was ever submitted. *Id.* at 3. William Kennedy retired from DuPont in 1998 and died in 2001 without having changed the designation of Liv Kennedy as his beneficiary under the SIP, as he was entitled to do under the plan. *Ibid*; J.A. 48.

After William Kennedy died, petitioner Kari Kennedy, the daughter of William Kennedy and Liv Kennedy, qualified as the independent executrix of her father's estate. Pet. App. 3, 33. By letter, she demanded that respondent DuPont plan administrator pay the funds in William Kennedy's account in the SIP to the estate, asserting that Liv Kennedy had waived her rights to those funds. *Ibid.* The plan administrator rejected petitioner's demand. It instead paid the funds in the SIP, which totaled more than $400,000, to Liv Kennedy, as the beneficiary designated by William Kennedy.

Ibid. Petitioner then sued to recover the benefits. *Ibid.*; see 29 U.S.C. 1132(a)(1)(B).

3. The district court granted summary judgment to petitioner. Pet. App. 31-52. The court noted circuit precedent that established that federal common law permits a named ERISA beneficiary to waive his or her entitlement to the proceeds of an ERISA plan furnishing life insurance benefits, "provided that the waiver is explicit, voluntary, and made in good faith." *Id.* at 38 (quoting *Manning* v. *Hayes*, 212 F.3d 866, 874 (5th Cir. 2000), cert. denied, 532 U.S. 941 (2001)). Applying that test, the court concluded that the 1994 divorce decree was an explicit, voluntary, and good-faith waiver by Liv Kennedy of her rights to the proceeds of the SIP. *Id.* at 41-43.

The district court rejected respondents' argument that giving effect to Liv Kennedy's waiver would violate ERISA's anti-alienation provision, concluding that an ex-spouse's waiver does not constitute an assignment or alienation. Pet. App. 43-45. The court also concluded that William Kennedy had no reason to submit a QDRO for the SIP, because a QDRO recognizes the interest of a non-participant spouse in obtaining benefits under the plan, and none of the proceeds of the SIP were subject to division in the divorce. *Id.* at 44. The court accordingly concluded that the DuPont plan administrator had wrongly paid benefits to Liv Kennedy, *id.* at 45, and it ordered respondents instead to pay the benefits to the estate, *id.* at 16.

4. The court of appeals vacated the judgment for petitioner and rendered judgment for respondents. Pet. App. 1-14. The court first concluded that the district court erred in relying on circuit precedent concerning waivers of benefits related to life-insurance plans, not-

ing that, under ERISA, life insurance plans are not "pension plans" but "welfare plans," to which ERISA's anti-alienation provision does not apply. *Id.* at 5-6. The court then considered whether to apply federal common law to recognize an ex-spouse's waiver of benefits in light of the anti-alienation provision. *Id.* at 7. The court concluded that the anti-alienation provision precludes recognition of such a waiver. *Id.* at 7-11.

The court of appeals began by noting that Treasury Department regulations define an "assignment or alienation" as "[a]ny direct *or indirect arrangement* . . . whereby a party acquires from a participant *or beneficiary* a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant *or beneficiary*." Pet. App. 8 (quoting 26 C.F.R. 1.401(a)-13(c)(1)(ii)). The court concluded that "Liv Kennedy's divorce-decree 'waiver' constitutes an 'indirect arrangement', by which the Estate gains an 'interest enforceable against the plan' and, therefore, falls under ERISA's anti-alienation provision." *Id.* at 8-9.

The court of appeals found "significant support" for its conclusion in ERISA's QDRO provision. Pet. App. 9. The court reasoned that the QDRO provision, which "recognizes the right to designate alternate payees under certain circumstances," "suppl[ies] the *sole* exception to the anti-alienation provision" in the marital-dissolution context. *Id.* at 9, 11 (citation omitted). The court concluded:

> When, as here, ERISA provides a specific mechanism—the QDRO—for addressing the elimination of a spouse's interest in plan benefits, but that mechanism is *not* invoked, there is no basis to formulate a federal-common-law rule. Requiring DuPont to rec-

> ognize the waiver in this situation would conflict with ERISA by purporting to determine rights to pension-plan benefits in a manner not authorized by the QDRO provisions, and, therefore, not permitted by the anti-alienation provision.

Id. at 11 (citations omitted).

SUMMARY OF ARGUMENT

The court of appeals reached the correct result for the wrong reasons. ERISA's provision forbidding the assignment or alienation of pension benefits does not preclude a divorcing spouse from waiving her beneficiary interest in a pension plan. Once the divorce takes effect, a participant can generally give effect to the waiver by removing the divorced spouse as a designated beneficiary and/or designating a different beneficiary. But while ERISA's anti-alienation provision does not forbid such a waiver, ERISA does forbid courts from imposing a federal-common-law rule that would require plan administrators to recognize a waiver, even when the participant has not taken the steps necessary to change the designated beneficiary. ERISA thus provides a straightforward method for divorcing spouses to eliminate a spouse's beneficiary interest in the other spouse's pension benefits, but it leaves no room for the type of common-law innovation that would require plan administrators to pay benefits in a manner that varies from the terms of the plan.

A. A plan beneficiary's waiver of rights in a participant's pension benefits does not violate ERISA's rule that pension benefits may not be assigned or alienated, 29 U.S.C. 1056(d)(1). A waiver, without more, is not an assignment or alienation. In trust law, which serves as ERISA's backdrop, a spendthrift provision forbidding

assignment or alienation does not prevent trust beneficiaries from renouncing their interests, provided that they do not attempt to direct who will receive the interests in their place. That understanding is consistent with ERISA's general approach to spousal rights in the pension context, which confers certain beneficiary rights on spouses but permits them to waive those rights in certain circumstances, and confers no statutory rights on ex-spouses, aside from whatever rights they may receive in a QDRO. That conclusion is supported by the regulation interpreting ERISA's anti-alienation provision, which the Treasury Department construes not to preclude plan beneficiaries from waiving their rights to pension plan benefits.

ERISA's QDRO provision, 29 U.S.C. 1056(d)(3)(B), is not a mechanism for a divorcing spouse simply to waive her rights as a beneficiary under her participant spouse's pension plan. The QDRO provision, which creates a general exception to the anti-alienation rule, sets forth the procedures necessary for a domestic relations order to make a permissible assignment of benefits to an "alternate payee." It does not, however, provide a mechanism for a divorcing non-participant spouse merely to renounce her interest in her participant spouse's pension benefits, without identifying an alternate payee as a beneficiary that will receive that interest in her place.

B. It does not follow, however, that merely because ERISA's anti-alienation provision does not forbid waivers, plan administrators must recognize such waivers, even when the participant has not taken the steps necessary to give the waiver effect under the plan. ERISA requires that a plan specify the basis on which payments are made from the plan, and it requires that a plan

be administered in accordance with the documents and instruments of that plan. 29 U.S.C. 1102(b)(4), 1104(a)(1)(D). A plan may provide a mechanism for a designated beneficiary to waive or disclaim benefits, but it need not do so. In the absence of a waiver that complies with terms of the plan, a plan administrator pays benefits only to a person who is designated as a beneficiary by the participant, or who is considered a beneficiary by operation of the statute. A spouse designated as a beneficiary generally remains a beneficiary under the plan unless and until the participant changes the designation. To require a plan administrator to give effect to a designated beneficiary's waiver as a matter of federal common law, when the participant has not changed the designation in accordance with plan terms, would undermine both the statutory rule that plans be administered in accordance with plan documents and the important interests in plan administrability that the rule serves.

ARGUMENT

ERISA provides a straightforward method for divorcing spouses to eliminate a former spouse's beneficiary interest in a participant's pension benefits: The plan participant can simply designate a different beneficiary. It is not necessary to that end for the non-participant spouse formally to renounce her interest. Regardless of the existence of such a waiver, the participant has the power unilaterally to change his beneficiary designation following dissolution of the marriage.

This case arises because the plan participant had designated his spouse as his beneficiary under a pension plan, and either failed to or chose not to change the designation following their divorce, even though the parties

agreed in a divorce decree that the beneficiary spouse would be divested of her rights related to his pension plans. In such a situation, the participant's beneficiary designation controls. That is not because, as the court of appeals held in this case, a divorce-decree waiver is a prohibited assignment or alienation of a beneficiary interest unless it takes the form of a QDRO: Without more, a waiver is not an assignment or alienation, and in any event, a QDRO does not provide a mechanism for simply waiving or renouncing an interest in plan benefits, as opposed to assigning an interest to an alternate payee. Rather, the beneficiary designation controls because ERISA requires plan administrators to administer plans in accordance with plan documents, and to distribute benefits to participants and their designated beneficiaries. ERISA's comprehensive framework leaves no room for crafting a federal-common-law rule that would require plan administrators to disregard those duties in the marital-dissolution context.

I. A DIVORCING SPOUSE'S WAIVER OF HER BENEFICIARY RIGHTS IS NOT BARRED BY ERISA'S ANTI-ALIENATION CLAUSE AND DOES NOT REQUIRE A QUALIFIED DOMESTIC RELATIONS ORDER

A. A Waiver Is Not A Prohibited Assignment Or Alienation

ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1), requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). It is designed to "ensure that the employee's accrued benefits are actually available for retirement purposes," H.R. Rep. No. 779, 93d Cong., 2d Sess. 66 (1974); H.R. Rep. No. 807, 93d Cong., 2d Sess. 68 (1974), and reflects a "considered congressional policy choice * * * to safe-

guard a stream of income for pensioners (and their dependents[])]," *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990); see *Patterson* v. *Shumate*, 504 U.S. 753, 765 (1992).

As relevant here, ERISA's anti-alienation provision expressly applies "to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order," except where "the order is determined to be a qualified domestic relations order." 29 U.S.C. 1056(d)(3)(A). The court of appeals in this case concluded that a QDRO is the only available "mechanism * * * for addressing the elimination of a spouse's interest in plan benefits," and that, absent a QDRO, a non-participant spouse's divorce-decree waiver of her interest constitutes a prohibited assignment or alienation under ERISA. Pet. App. 11. The court was mistaken. A designated beneficiary's waiver of the right to receive pension plan benefits, without more, is not an "assignment" or "alienation."

1. The term "assign" means "[t]o transfer, as to assign property, or some interest therein." *Black's Law Dictionary* 152 (4th rev. ed. 1968) (*Black's*); accord *Webster's New International Dictionary* 166 (2d ed. 1958) (*Webster's Second*) ("[t]o transfer or to make over to another"). Similarly, the term "alienate" means "[t]o convey; to transfer the title to property." *Black's* 96; accord *Webster's Second* 65 (primary definition of "alienate" is "[t]o convey or transfer to another"); see *ibid.* (defining "alienation" as "[a] transfer of ownership or title; a legal conveyance of property to another"). A beneficiary does not "assign" or "alienate" her rights when she waives them, because, without more, a waiver does not *transfer* rights to another person. To be sure,

the effect of a waiver may be that the beneficiary's interest reverts to the participant. But that is not a transfer that amounts to an assignment or alienation. Only a transfer of interest to a *third party* counts. A waiver is, by contrast, a *disclaimer* of rights: that is, "a refusal of benefits on the part of the individual slated to receive them." *McGowan* v. *NJR Serv. Corp.*, 423 F.3d 241, 248 (3d Cir. 2005), cert. denied, 127 S. Ct. 1118 (2007); see *Fox Valley & Vicinity Constr. Workers Pension Fund* v. *Brown*, 897 F.2d 275, 279 (7th Cir. 1990) (en banc) (distinguishing between waiver and assignment or alienation).

The distinction between a waiver and an assignment or alienation is rooted in the common law of trusts, which "serves as ERISA's backdrop," *Beck* v. *Pace Int'l Union*, 127 S. Ct. 2310, 2316 (2007), and thus "offers a starting point" for interpreting the statute, *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (citation omitted). ERISA's prohibition against assignment or alienation is analogous to a trust-law "spendthrift provision." *Boggs* v. *Boggs*, 520 U.S. 833, 852 (1997). In trust law, although the beneficiary of a spendthrift trust—that is, a trust that prohibits assignment or alienation of the beneficiary's interest—may not transfer her interest to another person, she may disclaim it, provided that she has not already accepted her interest in the trust and that she does not attempt to direct who is to receive the interest in her place. See, *e.g.*, Restatement (Third) of Trusts § 58(1) cmt. c at 359 (2003); Restatement (Second) of Trusts § 36, cmt. c at 100 (1959); 3 *Scott & Ascher on Trusts* § 15.2.9, at 933-934 (5th ed. 2007); see also, *e.g.*, *Roseberry* v. *Moncure*, 429 S.E.2d 4, 6 (Va. 1993); *Commerce Trust Co.* v. *Fast*, 396 S.W.2d 683, 687 (Mo. 1965);

Central Nat'l Bank v. *Eells*, 215 N.E.2d 77, 81 (Cuyahoga County, Ohio Prob. Ct. 1965).[1]

The distinction between waivers and assignments or alienations applies in the context of domestic relations orders, as it does elsewhere in ERISA's pension plan provisions. Although Section 1056(d)(3)(A) provides that ERISA's anti-alienation provision "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order," unless the order is a QDRO, there is no reason to conclude that Congress intended by using the words "creation" and "recognition" to expand the prohibition against "assignment" and "alienation" beyond its ordinary meaning. The QDRO provision itself suggests otherwise; it indicates that Congress was concerned with orders that "create[] or recognize[] the existence of *an alternate payee's right* to, or assigns to *an alternate payee* the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. 1056(d)(3)(B)(i)(I) (emphasis added).

The legislative history of the QDRO provision confirms the point. See S. Rep. No. 575, 98th Cong., 2d Sess. 19 (1984) ("[I]f a domestic relations order requires the distribution of all or a part of a participant's benefits under a qualified plan *to an alternate payee*, then the creation, recognition, or assignment of the alternate payee's right to the benefits is not considered an assign-

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[1] The principle that a plan beneficiary may waive a benefit under the plan without violating the prohibition against assignment or alienation does not mean that a plan participant may waive his benefits, because a waiver by a pension plan participant must also satisfy the nonforfeiture requirements of 29 U.S.C. 1053(a). Those requirements do not apply in the case of a participant's death. 29 U.S.C. 1053(a)(3)(A).

ment or alienation of benefits under the plan if and only if the order is a qualified domestic relations order.") (emphasis added). Congress's concern in enacting the QDRO provision was to make clear that domestic relations orders that create rights in or assign rights to alternate payees, or recognize rights conferred on alternate payees by operation of state law, may result in the division of pension plan benefits in appropriate circumstances. See *id.* at 18-19; cf. *Boggs*, 520 U.S. at 848-850. The creation or recognition of a right in, or assignment of a right to, an alternate payee to receive plan benefits that would otherwise be payable to the participant or another beneficiary is an "assignment" or "alienation" as those terms are commonly understood and as they are understood in trust law. The mere *renunciation* by a non-participant spouse of the right she previously had to receive benefits, without more, is not an assignment or alienation. That is true even where, as here, the renunciation is accompanied by an acknowledgment that the interest effectively reverts to the plan participant. See Pet. App. 64.

2. a. The conclusion that a designated beneficiary's waiver is not a prohibited assignment or alienation is consistent with ERISA's general approach to spousal protections in connection with pension benefits.

In 1984, Congress amended ERISA to give spouses certain statutory rights with respect to a participant's pension. Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426. Those rights include a right to receive a survivor's annuity when pension benefits are paid in the form of an annuity. 29 U.S.C. 1055(a), (b)(1)(A) and (B). When the plan is not required to provide an annuity form (as is true of most individual account plans), the participant does not elect to receive the

payment of benefits in the form of a life annuity, and certain other conditions are met, the surviving spouse has a right to the balance of the account on the participant's death. 29 U.S.C. 1055(b)(1)(C); see *Boggs*, 520 U.S. at 843. A participant can waive the survivor form of benefit, or designate a beneficiary other than the spouse to receive the balance of the participant's individual account, but only if the spouse consents in writing and the consent otherwise meets statutory and regulatory requirements. See 29 U.S.C. 1055(b)(1)(C)(i), (c)(2)(A) and (c)(3); 26 C.F.R. 1.401(a)-20, 1.417(a)(3)-1. With respect to a former spouse, however, there is no restriction, in the absence of a QDRO, on the participant's ability to waive the survivor form of the benefit or designate an alternate beneficiary.

Notably, while Congress expressly permitted non-participant spouses to consent to a participant spouse's designation of a different beneficiary, as well as to consent to permit the participant spouse to make designations free from any requirement of further spousal consent, and thereby to relinquish their survivor beneficiary rights, 29 U.S.C. 1055(c)(2), it did not find it necessary to provide an exception to the anti-alienation provision in that situation, as it did in the case of a QDRO. To read the anti-alienation provision to prohibit spouses from relinquishing their interests in pension benefits thus would conflict with important elements of the statutory scheme. See, *e.g.*, *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 370 (1986) (noting "the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict").

To read the anti-alienation provision to prohibit *a divorcing spouse* from renouncing a beneficiary interest in pension benefits would also be inconsistent with the

statutory scheme. After a marriage has ended, a former spouse is no longer a "spouse" statutorily entitled to be a beneficiary under the joint-and-survivor-annuity and other provisions of 29 U.S.C. 1055. Congress instead protected former spouses by allowing the parties to obtain a QDRO assigning some or all of the plan participant's benefits to the former spouse (or to a child or other dependent). 29 U.S.C. 1056(d)(3); see 29 U.S.C. 1056(d)(3)(J) and (K). But absent a QDRO, a participant who previously had designated the spouse as a beneficiary, or whose spouse was automatically a beneficiary by virtue of Section 1055, is free to change that designation upon dissolution of the marriage, in conformity with the terms of the plan.[2] It would be strange indeed to interpret ERISA's anti-alienation provision to forbid a non-participant ex-spouse from waiving an interest in a participant's pension plan benefits when ERISA permits the participant *unilaterally* to designate a new beneficiary following dissolution of the marriage. Neither the waiver nor the unilateral change in beneficiary triggers the anti-alienation provision.

b. To treat a beneficiary's waiver of benefits as a prohibited assignment or alienation of pension benefits would also affect application of the provisions of the tax code that permit beneficiaries to disclaim interests in property in a trust and thereby render the gift tax inapplicable to the transfer. See 26 U.S.C. 2518; 26 C.F.R.

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[2] A participant may be restricted in changing the designation of a spouse as a beneficiary if the participant receives benefits in the form of a qualified joint-and-survivor annuity and the plan has started making payments to the participant. Similarly, a participant may be limited in the designation of a beneficiary if the participant has remarried. See 26 C.F.R. 1.401(a)-20, Q&A 25(b); 29 C.F.R. 4022.8(d). Neither situation is present here.

1.401(a)(9)-4, Q&A 4 (recognizing Section 2518's application in the pension plan context).[3] Treating a waiver as a prohibited assignment or alienation of benefits could prevent plans from offering this tax-saving opportunity to plan participants and their beneficiaries. In this case, although the SIP explicitly permitted such disclaimers, J.A. 50, petitioner does not argue that Liv Kennedy, who ultimately elected to receive benefits from the plan notwithstanding the divorce decree, made a qualified disclaimer under 26 U.S.C. 2518(b).[4]

3. In concluding that ERISA's anti-alienation provision forbids a divorce-decree waiver of the sort at issue here, the court of appeals relied not on the text of the statute, but on the Treasury Department's regulation implementing the Internal Revenue Code counterpart to ERISA's anti-alienation provision, which sets out one of the requirements for a retirement plan to be tax-qualified. See 26 U.S.C. 401(a)(13). Because the Secretary of the Treasury has authority to construe ERISA's prohibition against assignment or alienation of pension benefits, see p. 2, *supra*, as well as the power to promulgate

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[3] Enacted as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b), 90 Stat. 1893, Section 2518 codifies a longstanding rule regarding the effect of disclaimers on federal gift tax. Before Section 2518 was enacted, federal regulations provided that the gift tax would not apply if the intended recipient refused to accept ownership of the property and, *inter alia*, the refusal was effective under local law. See 26 C.F.R. 25-2511(c) (1959); cf. *Jewett* v. *Commissioner*, 455 U.S. 305, 306 (1982). Section 2518 was designed to establish specific and uniform standards for disclaimers for purposes of the federal gift tax. See H.R. Rep. No. 1380, 94th Cong., 2d Sess. 65-68 (1976).

[4] Under 26 U.S.C. 2518(b), a qualified disclaimer is an irrevocable and unqualified refusal by a person to accept an interest in property if, among other things, the person submits the disclaimer in writing and has not accepted the interest or any of its benefits.

regulations for enforcement of the Internal Revenue Code, 26 U.S.C. 7805, the Treasury regulation is the "applicable administrative regulation[]." *Guidry*, 493 U.S. at 371-372; see *Boggs*, 520 U.S. at 851-852. In relevant part, the regulation defines the terms "assignment" and "alienation" to include:

> Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

26 C.F.R. 1.401(a)-13(c)(1)(ii). The court of appeals in this case concluded that Liv Kennedy's divorce-decree waiver constituted a prohibited assignment or alienation within the meaning of that regulation because it was "an 'indirect arrangement', by which the Estate [of William Kennedy] gain[ed] an 'interest enforceable against the plan.'" Pet. App. 8-9 (quoting 26 C.F.R. 1.401(a)-13(c)(1)(ii)); accord *McGowan* v. *NJR Serv. Corp.*, 423 F.3d 241, 249 (3d Cir. 2005), cert. denied, 127 S. Ct. 1118 (2007). The court of appeals was mistaken.

It is the Treasury Department's position that no party "acquires from" a beneficiary a "right or interest enforceable against a plan" pursuant to a beneficiary's waiver of rights where the beneficiary does not attempt to direct her interest in pension benefits to another person. That conclusion is consistent with the language and background of the anti-alienation provision, as well as with the Treasury Department's recognition of disclaimers in the pension context.[5]

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[5] Specifically, Treasury Department regulations governing minimum distribution requirements under 26 U.S.C. 401(a)(9) provide that "if a

Such a waiver differs from the sort of transfer at issue in *Boggs*, in which the Court relied in part on the Treasury regulation in holding that a deceased non-participant spouse's attempted testamentary transfer of a purported state-law community-property interest in her ex-husband's pension plan to her sons would be a prohibited assignment or alienation. See 520 U.S. at 851-852; cf. Pet. App. 8. The attempted testamentary transfer directed the non-participant spouse's purported interest to specified individuals, and, if effective, would have given those individuals an enforceable right against the plan at the expense of the participant's surviving spouse. *Boggs*, 520 U.S. at 851-852. Without more, however, a waiver, unlike such an attempted testamentary transfer, does not *direct* an interest from the beneficiary to any other individual, such that the individual can be said to "acquire[] from" the beneficiary an interest he or she would not otherwise have had. A waiver simply results in the interest reverting to the participant, with the result that the benefits become payable to the participant or to the person designated as the participant's beneficiary by the participant or under the terms of the

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person disclaims entitlement to [an] employee's benefit, pursuant to a disclaimer that satisfies [26 U.S.C. 2518] * * * [,] thereby allowing other beneficiaries to receive the benefit in lieu of that person, the disclaiming person is not taken into account in determining the employee's designated beneficiary." 26 C.F.R. 1.401(a)(9)-4, Q&A 4. An Internal Revenue Service General Counsel Memorandum makes plain that such disclaimers are not deemed to violate the tax code's counterpart to ERISA's anti-alienation provision. *IRS General Counsel Memorandum* 39,858, 1991 WL 776304 (Sept. 23, 1991). Although the General Counsel Memorandum has no precedential effect, *ibid.*, it is relevant here because it makes explicit what is already implicit in the Treasury Department's treatment of disclaimers in the pension context.

plan. Even if a waiver inures to the benefit of the participant, the participant is not a "party [who] acquires" a benefit "from a * * * beneficiary" under the regulation. And that is how the agency construes the regulation.

The Treasury Department's reasonable interpretation of its regulation is controlling, and it forecloses the court of appeals' contrary interpretation. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007); *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). To the extent that the anti-alienation provision in ERISA itself might be read as ambiguous with respect to the question presented here, the Treasury Department's regulation, correctly interpreted, represents a reasonable interpretation of the statute, and it therefore warrants deference. See, *e.g.*, *Long Island Care at Home*, 127 S. Ct. at 2350-2251; *Boeing Co.* v. *United States*, 537 U.S. 437, 448 (2003) (deferring to Treasury regulation).[6]

B. A QDRO Is Not Required For, And Does Not Provide A Mechanism For, A Bare Waiver Of Rights

Because an ex-spouse's waiver of her status as a designated beneficiary under a participant's pension plan is not a prohibited assignment or alienation, application of the QDRO provision is unnecessary to save such a waiver from invalidity under ERISA's anti-alienation provision. The QDRO provision is, in any event, not an

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[6] In an amicus brief filed in *Keen* v. *Weaver*, 121 S.W.3d 721 (Tex. 2003), the Department of Labor stated that application of a federal common-law waiver rule to pension plans would conflict with ERISA's prohibition against assignment or alienation of benefits. The Secretary of Labor has reconsidered that position and now agrees with the Secretary of Treasury, who is responsible for interpreting the anti-alienation provision, that no assignment or alienation occurs if the beneficiary waives her rights, without attempting to direct her interest to another person.

available means of accomplishing a bare waiver of rights.

1. Enacted as part of the 1984 REA amendments to ERISA, the QDRO provision was designed to resolve questions that had arisen concerning whether ERISA's anti-alienation provision barred garnishment of pension plan benefits for purposes of enforcing state domestic relations orders providing for, among other things, alimony and child support payments. See *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 838-839 (1988). In the REA, Congress made clear that certain domestic relations orders, including state-court orders approving property-settlement agreements "relat[ing] to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant," may provide for the assignment of pension plan benefits, provided that they comply with certain requirements. 29 U.S.C. 1056(d)(3)(B)(ii) and (J). A domestic relations order that has been determined to satisfy the requirements for being a "qualified domestic relations order," or QDRO, is exempt from ERISA's general preemption clause, see 29 U.S.C. 1144(b)(7), as well as ERISA's anti-alienation provision, see 29 U.S.C. 1056(d)(3)(A). See *Boggs*, 520 U.S. at 846-847.[7]

Consistent with its purpose, ERISA's QDRO provision provides a mechanism for divorcing spouses to attach an ERISA plan participant's pension benefits to provide for the support of a non-participant former spouse or a child or other dependent. It does not, however, provide a mechanism for a non-participant spouse

[7] ERISA also provides other exceptions to the anti-alienation rule. See 29 U.S.C. 1056(d)(2) and (4); 26 U.S.C. 401(a)(13). Those exceptions are not relevant in this case.

simply to *renounce* or *disclaim* an interest in a participant's pension plan benefits. By definition, a QDRO "creates or recognizes the existence of an alternate payee's right" to a participant's benefits under a plan, 29 U.S.C. 1056(d)(3)(B)(i)(I). A domestic relations order that incorporates a bare *waiver*, without recognizing or creating a right in an alternate payee, or assigning to an alternate payee a right to "receive all or a portion of the benefits payable with respect to a participant," cannot be a QDRO. *Id.* An "alternate payee" is defined as "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." 29 U.S.C. 1056(d)(3)(K). While a "former spouse" may be an "alternate payee" under that definition, a "participant" cannot. Thus, while divorcing spouses may use a QDRO to preserve or confer rights on the non-participant spouse, or a child or other beneficiary, a QDRO cannot result in the beneficiary's bare *waiver* of rights, because such a waiver does not create or recognize any rights in an alternate payee.

II. ALTHOUGH A DESIGNATED BENEFICIARY'S WAIVER OF PENSION BENEFITS IS NOT A PROHIBITED ASSIGNMENT OR ALIENATION, A PLAN ADMINISTRATOR IS NOT REQUIRED TO GIVE EFFECT TO A WAIVER THAT CONFLICTS WITH PLAN DOCUMENTS

Although a divorcing spouse's waiver does not violate ERISA's anti-alienation provision, that does not mean that the plan administrator must recognize the waiver, even if the participant has not taken the steps necessary to ensure that the waiver is given effect under the terms of the plan. Although the court of appeals did not reach

the issue in this case, ERISA requires a plan administrator to distribute benefits to the beneficiary designated by the participant or under the terms of the plan. A waiver that is not given effect consistent with the provisions of the plan documents cannot trump the terms of the plan. Thus, the appropriate mechanism for eliminating the beneficiary interest of an ex-spouse is for the participant to change the beneficiary designation in accordance with plan terms. That process is generally not difficult. But in all events, the entry of a divorce decree purporting to waive the non-participant spouse's interest is neither necessary nor sufficient to accomplish that end.[8]

1. a. ERISA provides that a plan shall "specify the basis on which payments are made to and from the plan," 29 U.S.C. 1102(b)(4), and that the plan administrator must administer the plan "in accordance with the documents and instruments governing the plan," 29 U.S.C. 1104(a)(1)(D). The requirement that plan administrators act in accordance with plan documents serves "[o]ne of the principal goals of ERISA": that of "enabl[ing] employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of

[8] This Court limited its grant of certiorari to the third question presented in the petition. It thereby declined to grant review of the second question, which asked whether federal common law requires respondents to give effect to Liv Kennedy's waiver, despite the fact that the plan documents—given William Kennedy's 1974 beneficiary designation form, which was never changed following the Kennedys' divorce—identified Liv Kennedy as the beneficiary. 128 S. Ct. 1225 (2008); see Pet. i. For the reasons explained herein, however, consideration of the plan documents is critical in evaluating whether the court of appeals reached the correct result in this case.

benefits.'" *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001) (citation omitted).

As this Court has recognized, a plan administrator's obligation to administer the plan in accordance with plan documents includes the obligation to distribute benefits to "beneficiaries." See *Egelhoff*, 532 U.S. at 147. The term "beneficiary" is defined in the statute as a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. 1002(8). In *Boggs*, the Court held that ERISA precludes a testamentary transfer of retirement benefits to persons not designated as beneficiaries by the plan participant or under the terms of the plan. 520 U.S. at 848-851; see *id.* at 850 (rejecting the argument that the Court should, "through case law, create a new class of persons for whom plan assets are to be held and administered," because "[t]he statute is not amenable to this sweeping extratextual extension").

Later, in *Egelhoff*, the Court held that ERISA preempted, as applied to ERISA plans, a state law that provided that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce. The Court explained that applying an automatic revocation rule to plan benefits would undermine both ERISA's explicit command that plans be administered according to plan documents and the statute's aim of "nationally uniform plan administration." *Egelhoff*, 532 U.S. at 143, 148; see *id.* at 146-150. The Court noted that the state law would prevent plan administrators from "mak[ing] payments simply by identifying the beneficiary specified by the plan documents," and would instead require them to "familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been 'revoked' by opera-

tion of law." *Id.* at 148-149. The Court concluded that such a result "would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries." *Id.* at 149-150.

b. The foregoing principles are equally applicable in this context: A rule that would require plan administrators to recognize a waiver contained in a state-court divorce decree, even when the participant has not taken the steps necessary to effectuate the waiver, and thus allow the decree to trump the beneficiary designated according to the plan, would conflict with the plan administrator's duties under ERISA and would undermine the principles of plan administrability that underlie the statute.

The detailed standards Congress set out in ERISA's QDRO provision furnish useful guidance in that regard. The QDRO is, of course, a narrow exception to the requirement that the plan administrator make payment determinations strictly by reference to the plan terms. And that narrow exception is accompanied by numerous safeguards that minimize the burden on the plan administrator and that ultimately treat the terms of the QDRO as if they were part of the plan itself. Under the statute, a domestic relations order is a QDRO only if it clearly specifies the name and last known mailing address of the participant and the name and mailing address of each alternate payee covered by the order; the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee or the manner in which the amount or percentage is to be determined; the number of payments or period to which the order applies; and each plan to which the order applies. 29 U.S.C. 1056(d)(3)(C). A QDRO may not require a plan

to provide any type or form of benefit, or any option, not otherwise provided under the plan, or to provide increased benefits on an actuarial basis, or to pay benefits to one alternate payee that a previous QDRO specifies are to be paid to another alternate payee. 29 U.S.C. 1056(d)(3)(D). A plan administrator determines if a domestic relations order is a QDRO. 29 U.S.C. 1056(d)(3)(G). If the plan administrator determines that the order qualifies, the alternate payee identified in the order is considered a beneficiary under the plan. 29 U.S.C. 1056(d)(3)(J).

By setting such detailed requirements for a domestic relations order to be a QDRO, Congress created clear rules for plan administrators to apply to resolve conflicts between plan terms and a domestic relations order. Those detailed requirements are intended to "minimize the burden on the plan and eliminate confusion over what the [domestic relations] court is ordering." H.R. Rep. No. 655, 98th Cong., 2d Sess., Pt. 1, at 39 (1984). And in providing that an alternate payee identified in a QDRO is to be considered a plan beneficiary, Congress was careful to "conform[] entitlements to benefits with participant or beneficiary status." *Boggs*, 520 U.S. at 847. The QDRO provision thus demonstrates a continuing commitment to the principle that a plan administrator must pay benefits, and administer the plan, according to plan documents. See *id.* at 847, 850; *Egelhoff*, 532 U.S. at 147-149.

By contrast, giving dispositive effect to a waiver in a divorce decree would not only require administrators to disregard their duty to distribute benefits to the beneficiary designated under the plan, but would impose substantial administrative burdens without the kind of safeguards that accompany the QDRO. Plan administrators

would be "[f]orc[ed] * * * to examine a multitude of external documents that might purport to affect the dispensation of benefits." *Estate of Altobelli* v. *IBM*, 77 F.3d 78, 82-83 (4th Cir. 1996) (Wilkinson, J., dissenting); see *Krishna* v. *Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993); *McGowan*, 423 F.3d at 246 (opinion of Van Antwerpen, J.). They would have to decide among the "myriad of tests" courts have developed to determine whether language in a domestic relations order is sufficient to constitute a valid waiver. *Strong* v. *Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 332 (Neb. 2005) (Connolly, J., dissenting).[9] And they would inevi-

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[9] The various approaches predictably result in substantially similar language being treated differently. See *Strong*, 701 N.W.2d at 33 (Connolly, J., dissenting) (citing cases). In this case, the parties' divorce decree awarded to William Kennedy his interests, and divested Liv Kennedy of her interests, in "any profit-sharing plan, savings plan, employee thrift plan, employee stock ownership plan, retirement plan, pension plan, or like benefit program existing by reason of [his] past or present or future employment, except for that portion awarded to LIV KENNEDY." Pet. App. 64-65. The district court concluded that this document was a specific waiver. *Id.* at 41-43. Other courts, however, have interpreted similar language differently. Compare *Lyman Lumber Co.* v. *Hill*, 877 F.2d 692, 693-694 (8th Cir. 1989) (divorce decree insufficient where it gave participant "his entire interest in the Plan free of any interest of [the divorcing spouse]" but did not "specifically refer to and modify the beneficiary interest"); *PaineWebber Inc.* v. *East*, 768 A.2d 1029, 1032-1035 (Md. 2001) (divorce decree insufficiently specific); *Tremaine* v. *Tremaine*, 780 A.2d 522, 524 (N.H. 2001) (divorce decree insufficiently specific); and *Estate of Bowden* v. *Aldridge*, 595 A.2d 396, 397-398 & n.4 (D.C. 1991) (separation and property settlement agreement insufficiently specific), with *Ridley* v. *Metropolitan Fed. Bank FSB*, 544 N.W.2d 867, 868 (N.D. 1996) (finding waiver where divorce decree provided that "[e]ach party shall own free of any interest of the other all savings accounts, checking accounts and every other asset of every nature"), and *Estate of Anello* v. *McQueen*, 953 P.2d 1143, 1146-1147 (Utah 1998) (finding waiver).

tably be drawn, as the plan administrator was in this case, see Pet. App. 41-43, into disputes regarding whether language in a divorce decree constitutes a knowing and voluntary waiver. Requiring plan administrators to undertake such a review would create a risk of inconsistent interpretations of identical divorce decrees, thus undermining the interest in nationally uniform plan administration. See *Egelhoff*, 532 U.S. at 148. And it would, critically, "create a risk of litigation and administrative burdens" far weightier than any burden that might be associated with application of the QDRO provision. *McGowan*, 423 F.3d at 247 (opinion of Van Antwerpen, J.). Requiring plan administrators to provide benefits only to persons authorized to receive them under the terms of the plan avoids that result. See, *e.g.*, *McMillan* v. *Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) ("If the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary, thus avoiding expensive litigation."); *Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting) ("Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules."). And all this potential confusion is eliminated if the participant takes the steps necessary to effectuate the waiver consistent with the terms of the plan.

2. Petitioner's argument (Pet. Br. 25, 47-52) rests on the premise that, in the absence of a provision in ERISA that specifically addresses waivers by a beneficiary, courts may fill the gap by requiring plan administrators to give effect to beneficiary waivers as a matter of federal common law. There is, however, no gap here for the common law to fill. Congress has legislated comprehen-

sively in the area of spousal rights to pension benefits, and it has been careful to provide detailed and specific requirements for plan administrators to follow, as well as to adhere to the principle that plan administrators must pay benefits only to persons who are "participants" or "beneficiaries" within the meaning of ERISA. In accordance with that principle, the plan provides a method for eliminating a designated beneficiary's interest in plan benefits: The participant may file a change of beneficiary form with the plan. Resort to federal common law is therefore inappropriate. As this Court has recognized, "[t]he authority of courts to develop a 'federal common law' under ERISA * * * is not the authority to revise the text of the statute." *Mertens* v. *Hewitt Assoc.*, 508 U.S. 248, 259 (1993) (citation omitted).

ERISA's detailed provisions for the protection of spousal interests in pension benefits demonstrate that Congress intended for plan administrators to adhere to plan documents, even where a non-QDRO divorce decree might provide for an alternative disposition of pension benefits. As the reported cases indicate, most of the controversies that have arisen concerning the effect of waivers have concerned divorce-decree waivers that the waiving party later challenges as invalid; ERISA provides clear rules for plan administrators to apply in such situations, and the participant spouse can avoid any problems simply by changing the beneficiary designation. The result is parallel to the operation of 29 U.S.C. 1055 *during* the marriage. While the non-participant spouse may consent to the participant spouse's waiver of his right to a joint-and-survivor annuity, it ultimately is up to the participant whether to execute such a waiver. See pp. 14-15, *supra*.

As noted above, the SIP did provide for disclaimers that conform to the strict requirements and formalities of 26 U.S.C. 2518. J.A. 50. Thus, had Liv Kennedy disclaimed her interest in the funds in William Kennedy's SIP account following his death, in a manner that complied with Section 2518, presumably the plan administrator would have honored that decision. Plans that do not contain similarly express provisions may nevertheless be interpreted by plan administrators to allow disclaimers.

3. Petitioner argues (Pet. Br. 60-63), like the respondents in *Egelhoff*, that a rule that plan administrators must pay benefits pursuant to the participant's beneficiary designation would mean that a state "slayer" statute could not operate to revoke the beneficiary status of a person who has murdered a plan participant. See *Egelhoff*, 532 U.S. at 152 (not deciding whether ERISA preempts such slayer statutes). As in *Egelhoff*, that question is not presented in this case and there is thus no need for this Court to decide it. *Ibid.* If a slayer exception were to be recognized under ERISA, however, the proper approach would be to interpret that background rule to be implicit in ERISA and the plans governed by it. Direct application of *state* slayer statutes to ERISA plans would be preempted, since they would clearly "relate to" the plans, see 29 U.S.C. 1144(a), although such a law might in some circumstances be saved from preemption as an insurance regulation under 29 U.S.C. 1144(b)(2)(A).

The slayer rule is, however, distinguishable from the federal-common-law waiver rule that petitioner urges. The slayer rule is "well established in the law and has a long historical pedigree predating ERISA." *Egelhoff*, 532 U.S. at 152 (citing *Riggs* v. *Palmer*, 22 N.E. 188

(N.Y. 1889)); see, *e.g.*, *Mutual Life Ins. Co.* v. *Armstrong*, 117 U.S. 591, 600 (1886). As this Court has noted, it is "at least debatable" whether the rule "interfere[s] with the aims of ERISA." *Egelhoff*, 532 U.S. at 152. For the reasons explained above, see pp. 27-28, *supra*, the same cannot be said of the federal-common-law rule that petitioner advocates.

4. Although the court of appeals was incorrect to conclude that Liv Kennedy's waiver of her beneficiary interest was prohibited by ERISA's anti-alienation rule, it was correct to conclude that ERISA leaves no room for courts to require a plan administrator to recognize such a waiver. ERISA requires a plan administrator to administer plans according to their documents and instruments, and to pay benefits to a person who is a beneficiary as defined in the statute. Those provisions are clear, and allow for the result petitioner seeks through the simple expedient of a change of beneficiary by the participant, but they preclude application of the federal-common-law rule that petitioner proposes.

The question whether the divorce-decree waiver in this case overrides William Kennedy's designation of Liv Kennedy as his beneficiary under the SIP was argued before the court of appeals, see Resp. C.A. Br. 35; Resp. C.A. Reply 6-7, and, for the reasons explained above, yields a straightforward answer to the central question in this case. The Court may accordingly affirm on that basis. But because the court of appeals did not explicitly address the question, and in light of the Court's limited grant of certiorari, the Court may decide to permit the court of appeals to address the question in the first instance. The Court may therefore wish to vacate the judgment of the court of appeals and remand for consideration of the question whether Liv Kennedy's divorce-

decree waiver, although not a prohibited assignment or alienation under ERISA, overrides William Kennedy's designation of Liv Kennedy as his beneficiary.

CONCLUSION

The judgment of the court of appeals should be affirmed. In the alternative, the judgment should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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In the Supreme Court of the United States

KARI E. KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,
Petitioner,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, E.I. DUPONT DE NEMOURS & COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1/]

AARP is a nonpartisan, nonprofit membership organization of nearly 40 million people age 50 or older, working or retired, dedicated to addressing the needs and interests of older persons. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance quality of life for all. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age by seeking to increase the availability, security, equity, and adequacy of public and private pension, health, disability, and other employee benefits.

As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving ERISA. *See, e.g.*, *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Boggs v. Boggs*, 520 U.S. 833 (1997); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

AARP's members and other participants and beneficiaries in private, employer-sponsored employee benefit plans rely on the Employee Retirement Income

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[1/] This Brief of *Amicus Curiae* AARP in support of neither party is filed with the consent of both parties. In compliance with Rule 37.6 of this Court, AARP states that no counsel for any party authored this brief in whole or in part, and further, that no party or entity other than *amicus* or its members made a monetary contribution to the preparation or submission of this brief.

Security Act (ERISA) to protect their rights under those plans. ERISA's protections, and the ability to enforce those protections, are of vital concern to older workers, retirees and their designated beneficiaries, since the quality of their lives depends heavily upon the security and amount of their pension and welfare benefits. For most couples who divorce, the value of the retirement assets earned by one or both parties of the couple is one of the two largest marital assets, the other being the value of the equity in their home. Hilary Greer Fike, *Qualified Pension Trends and Divorce Considerations*, 14 AM. J. FAM. L. 234 (2000). Understanding the relationship between state domestic relations law and ERISA is crucial for divorcing couples and their counsel so that they may effectuate the division of martial property that either they have agreed upon or the state court has ordered.

Thus, the decision in this case will have a direct and vital bearing on the economic security of AARP's members and other beneficiaries of employee benefit plans. In light of the significance to its members of the issues presented by this case, AARP respectfully submits this brief *amicus curiae*.

SUMMARY OF ARGUMENT

Section 404(a)(1)(D) of ERISA requires that a plan be operated in accordance with its terms as long as those terms are consistent with the statute. 29 U.S.C. § 1104(a)(1)(D). ERISA states that benefits are to be paid to participants and beneficiaries. 29 U.S.C. §§ 1002(7) & (8). A beneficiary is defined as a person designated by a participant or by the terms of the plan

to receive benefits under the plan. 29 U.S.C. § 1002(8). ERISA expressly identifies three categories of individuals which must be considered beneficiaries under the terms of a plan. First, surviving spouses must be considered beneficiaries under a pension plan unless they have waived their right to a benefit. 29 U.S.C. § 1055. Second, an alternate payee must be considered a beneficiary under a pension plan if a qualified domestic relations order is presented to the plan. 29 U.S.C. § 1056. Third, a child must be considered a beneficiary under a group health plan if a qualified medical child support order is presented to the plan. 29 U.S.C. § 1169. If an individual, like the executrix of Mr. Kennedy's estate does not meet the plan terms, she is not entitled to receive a benefit under the plan.

ARGUMENT

I. PLAN ADMINISTRATORS MUST PAY BENEFITS ONLY TO BENEFICIARIES DESIGNATED IN ACCORDANCE WITH THE PLAN DOCUMENTS.

A. ERISA Requires That Fiduciaries Follow Plan Provisions Unless They Are Inconsistent with the Statute.

The Court has recognized that plan sponsors have significant discretion to determine the design of an ERISA plan as long as ERISA's minimum requirements are met. *See Black & Decker Disability Plan v. Nord*, 538 U.S. at 833 ("employers have large leeway to design disability and other welfare plans as

they see fit."); *cf. Rush Prudential HMO v. Moran*, 536 U.S. 355, 386 (2002) ("whether [the standard of review must be discretionary] is simply a matter of plan design or the drafting of an HMO contract."). However, once the plan sponsor establishes the terms of the plan, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]." 29 U.S.C. § 1104(a)(1)(D).

In *Curtiss-Wright*, 514 U.S. 73, the Court determined, "plan administrators appear to have a statutory responsibility actually to run the plan in accordance with the currently operative, governing plan documents . . . " *Id.* at 84. Indeed, the Court consistently has required that plan administrators pay the beneficiary designated in accordance with the plan's provisions without consulting other documents to determine the correct beneficiary. *See Boggs v. Boggs*, 520 U.S. 833, 850 (1997) (concluding that individuals who were not participants or designated as beneficiaries in accordance with the plan documents have no claim to pension benefits); *cf. Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (stating plan administrators have a fiduciary duty to provide participants and beneficiaries "with the benefits authorized by the plan.").

In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the Court was confronted with a situation not dissimilar to this case. A participant divorced his spouse and failed to change his beneficiary designation before he died.

In order to address this issue, the state of Washington enacted a statute providing that the designation of a spouse as the beneficiary of a non-probate asset is revoked automatically upon divorce. The question before the Court was what law governed – ERISA or the state law. In holding that ERISA preempted the Washington statute, the Court explained:

> The statute . . . implicates an area of core ERISA concern. In particular, it runs counter to ERISA's command that a plan shall "specify the basis on which payments are made to and from the plan," §1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," §1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." §1002(8).

Id. at 147.

Accordingly, "[s]trict adherence to §1104(a)(1)(D) ensures that all interested parties, including participants, beneficiaries, and plan administrators, can identify their rights and duties with certainty, a primary objective of ERISA. This in turn limits costly disputes over the effect of outside documents on the distribution of plan benefits." *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 246 (3d Cir. 2005) (citing *Est. of Altobelli v. Int'l Bus. Machs. Corp.*, 77 F.3d 78, 82 (4th Cir. 1996) (Wilkinson, C.J., dissenting) (internal citations omitted)).

B. ERISA Mandates Plans to Include Three Specific Plan Terms Conferring the Right to Receive Benefits on Nonparticipants.

ERISA itself mandates that a plan must contain three terms concerning who, other than the participant, may receive benefits from an employee benefit plan. *See generally, Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983). However, the right of nonparticipant spouses or dependents to receive benefits is conferred only under limited and carefully delineated circumstances.

1. A covered pension plan must pay benefits to a surviving spouse unless the spouse has waived her rights.

If a participant in a covered pension plans is married for at least one year, Section 205(a) requires that the plan must provide a surviving spouse annuity. As a consequence, the spouse is automatically a beneficiary to this extent. 29 U.S.C. § 1055(a). This survivor's annuity may not be waived unless the spouse consents in writing to the designation of another beneficiary, witnessed by a plan representative or notary public.[2] 29 U.S.C.

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[2] Significantly, courts have required technical compliance with all of the requirements of Section 205 – a written consent, with a valid signature, properly witnessed to waive the survivor's annuity. *E.g., Lasche v. George W. Lasche Basic Profit Sharing Plan*, 111 F.3d 863, 866 (11th Cir. 1997) (signed waiver is invalid without it being witnessed or notarized); *accord, Hagwood v.*

§ 1055(c)(2)(A). *See also* ERISA § 205(e), 29 U.S.C. § 1055(e) providing a pre-retirement survivor's benefit to the spouse if a participant dies before receipt of a vested pension benefit. If the plan does not include these terms, it will not be considered a qualified trust. IRC § 401(a)(11), 26 U.S.C. § 401(a)(11).

2. A pension plan must pay benefits to an alternate payee if the plan receives a qualified domestic relations order.

Enacted as part of the Retirement Equity Act (REA), qualified domestic relations orders (QDROs) were designed to provide a limited exception to ERISA's anti-alienation provision by specifically permitting the "assignment . . . of a right to any benefit payable with respect to a participant pursuant to" a QDRO.[3] 29 U.S.C. § 1056(d)(3)(A); *see also* 26 U.S.C. § 414(p); *Boggs*, 520 U.S. at 839 (QDRO serves as "a

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Newton, 282 F.3d 285, 290 (4th Cir. 2002) (premarital agreements do not constitute effective waivers under ERISA because "ERISA's formalities must . . . be strictly enforced."); *Nat'l Auto. Dealers & Assocs. Ret. Trust v. Arbeitman*, 89 F.3d 496, 502 (8th Cir. 1996) (same); *Hurwitz v. Sher*, 982 F.2d 778, 782 (2d Cir. 1992) (same). These judicial decisions are consistent with principle that where Congress has established an exception to a general rule, courts have required all elements of the exception to be met in order to enforce the exception. *See, e.g., Ark. Best Corp. v. Comm'r*, 485 U.S. 212, 220 (1988).

[3] ERISA's "anti-alienation provision" was designed to prevent unwise assignment or alienation of plan benefits to "ensure that the employee's accrued benefits are actually available for retirement purposes." H.R. REP. NO. 93-779, at 66 (1974); *accord, Boggs*, 520 U.S. at 852.

limited exception to the pension plan anti-alienation provision"). Without this provision, if a plan paid benefits to an ex-spouse, the plan would violate ERISA's anti-alienation provision. IRC § 401(a)(13), 26 U.S.C. § 401(a)(13). This provision is essential to one of REA's central purposes, which is to give enhanced protection to a participant's spouse and dependent children in the event of divorce or separation.

Prior to the passage of REA, the courts were divided as to whether ERISA's anti-alienation provision prevented women from acquiring a portion of their husbands' retirement assets upon divorce, even if the ex-husband had assented and a state court had awarded them. *See* H.R. REP. NO. 98-655, pt. 1, at 30 (1984) (noting the division of state courts on this question); *Potential Inequities Affecting Women: Hearings Before the Senate Comm. on Finance*, 98th CONG. 235 (Part II) (1988) (statement of Patricia Kelly, President and Co-founder, KINDER). In order to settle the split in the federal common law that was developing, Congress stepped in to close the gaps in the statute and expressly address these issues. *Cf. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (courts may develop federal common law only where ERISA does not expressly address the issue before the court). Because ERISA sets forth definitive procedures as to how to become a beneficiary when couples divorce, there is no need to develop federal common law in this area. Indeed, such development would create additional exceptions to the anti-alienation provision in derogation of the statute. *See Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S.

365, 376 (1990).

Congress expressly enacted QDROs to"allow[ ] courts to recognize a nonparticipant spouse's . . . interest in pension plans . . ." providing that the QDRO's requirements are met, *id.*, and made them "part of the statute's mandatory participation and vesting requirements." *Boggs*, 520 U.S. at 841. If a domestic relations order recognizes a "spouse, former spouse, child, or other dependent of a participant" as having a right to receive benefits payable under a plan with respect to a participant, they are considered an "alternate payee." ERISA § 206(d)(3)(K), 29 U.S.C. § 1056(d)(3)(K). If the domestic relations order is found to be qualified, then the alternate payee is considered a beneficiary under the plan. ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J). As a beneficiary, the plan may pay benefits directly to a "spouse, former spouse, child, or other dependent of a participant."

3. A group health plan must provide health benefits to a child if the plan receives a qualified medical child support order.

Finally, ERISA requires group health plans to recognize qualified medical child support orders (QMCSOs) issued by state courts requiring a participant-parent to provide health care coverage through a plan. ERISA § 609(a)(1), 29 U.S.C. § 1169(a)(1). Under a QMCSO, the child is considered a beneficiary under the participant's plan and is eligible to receive health benefits under that plan.

ERISA § 609(a)(7), 29 U.S.C. § 1169(a)(7).

C. ERISA Identifies Those Persons Who May Receive Benefits Under a Plan.

In order to obtain benefits under an ERISA covered plan, a participant or beneficiary must comply with Congress' scheme setting forth in great detail the "who, what, when and how." *See generally*, *Shaw.*, 463 U.S. at 91 (noting that ERISA imposes "participation, funding and vesting requirements" on pension plans along with "various uniform standards" for every plan including rules concerning "reporting, disclosure and fiduciary responsibility" for every plan); *Boggs*, 520 U.S. at 841 ("surviving spouse annuity and QDRO [qualified domestic relations order] provisions . . . are part of the statute's mandatory participation and vesting requirements.").

As part of its benefit scheme, ERISA limits the persons who may receive benefits under a plan to either a participant or beneficiary. A participant is defined as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." ERISA § 3(7), 29 U.S.C. § 1002(7). A beneficiary is defined as either "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become eligible to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8).

Apart from the mandated plan provisions,

ERISA itself does not confer the right to receive benefits on a nonparticipant. Accordingly, unless a nonparticipant meets the criteria under the plan's provisions to be considered a beneficiary, the nonparticipant has no rights under the plan to receive benefits. ERISA's silence with respect to the right of a nonparticipant to receive plan benefits, other than by following the plan terms, provides powerful support for the conclusion that such a right does not exist. *Boggs*, 520 U.S. at 846-48. Instead, it provides compelling support for the contrary proposition – that the only means by which a nonparticipant can receive a benefit is through the specific provisions of the plan. The Court has adamantly refused to create new classes of persons for whom plan assets are to be administered, *Boggs*, 520 U.S. at 850; *Guidry*, 493 U.S. at 376, and it should not do so here.

D. Because the Executrix of Mr. Kennedy's Estate Is Neither a Participant Nor a Beneficiary under the Terms of the Dupont Savings Plan, She Is Not Entitled to Receive a Benefit under the Plan.

It is quite apparent that the executrix of Mr. Kennedy's estate does not meet the definition of a beneficiary or participant under the DuPont Savings plan. Nor does she fall into any of the plan provisions mandated by ERISA which are included in the DuPont Savings Plan. Accordingly, she has no rights under the statute or the plan to receive benefits.

This case would not be before the Court if Mr.

Kennedy had updated his designation of beneficiary form, which he clearly had ample time and opportunity to do, or if the QDRO had referenced the Dupont Savings Plan and the ex-spouse's waiver.[4/] The participant had the means and control to effectuate his intent. Although the divorce decree indicated the parties' intent at the time of the decree, a plan should not have to guess whether the parties' intentions have changed since the divorce decree or whether the parties merely forgot to update the beneficiary designation in the plan. Instead, if the plan provisions are explicit, and participants are given notice of the provisions, as required under the statute, participants can be assured that their choices are followed. This perspective places direct responsibility upon participants to review their beneficiary designations when they experience a life change such as marriage, divorce or widowhood, and to follow the terms of their plan to make any changes, as they see fit.

The necessity of reviewing and changing beneficiary designations after a divorce is not a secret known only by those who toil in the minefields of ERISA. A search of the Internet results in numerous articles discussing this issue in both the mainstream

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[4/] Although the QDRO could have referenced the Savings Plan and stated that the then-Mrs. Kennedy waived any right to benefits under the Savings Plan, it was not necessary to do so. Instead, it would have been sufficient for Mr. Kennedy just to follow the plan rules and change the beneficiary designation. Requiring the parties to obtain a QDRO in similar cases would be unnecessarily expensive and waste judicial resources.

press,[5] and in legal periodicals focused on family law issues.[6] With such clear warnings to both individuals and counsel, the courts should not develop a whole new structure to take care of the mistakes or forgetfulness of a few. There is no need to embroil ERISA plans in litigation, diminish plan assets to resolve these issues and siphon plan assets that could pay for better benefits.

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[5] *E.g.*, Kathy Kristof, *Estate Planning Can Help You Rest Easier*, LOS ANGELES TIMES, Oct. 28, 2007, *available at* 2007 WLNR 21231817 (cautioning individuals to keep beneficiary designations up to date); KIPLINGER, *Tie Up Loose Ends if You Untie the Knot* (May 1, 2007); Sandra Block, *Divorce Doesn't Mean Your ex Is No Longer Your Beneficiary*, USA TODAY, Sept. 6, 2004, *available at* http://www.usatoday.com/money/perfi/columnis/block/2004-09-06-block_x.htm.(urging individuals to check all accounts and change beneficiary designations); Sam Ali, *Lives Change: Update your beneficiary*, Star-Ledger, Aug. 3, 2003; Kaja Whitehouse, *Beneficiary-Designation Form Is Key to Passing on Your Assets*, WALL ST. J. at D-3, June 4, 2002.

[6] *E.g.*, Sharon Corbitt, *A Closing Gift for Your Client*, 29 FALL FAM. ADVOC. 45 (Fall 2006) (suggesting sending a closing letter to the client after the court signs the divorce order specifically stating that all beneficiary designations on any retirement benefits, life insurance, banks accounts should be changed to be "consistent with your wishes as a single person."); Stewart W. Gagnon,, *et al.*, *Pensions, Retirements Benefits, and Deferred Compensation*, 2 TEX. PRAC. GUIDE FAMILY LAW § 8:50 (Nov. 2007) ("Practice Tip [after the Court's decision in *Egelhoff*]: Be Sure to advise your client in writing of the immediate need to file a change of beneficiary form with the plan administrator of his or her ERISA insurance policy or other benefit plan."); American Bar Association, *Closing & Post-judgment*, 30 WTR FAM. ADVOC. 46 (Winter 2008) (suggesting that at the conclusion of divorce proceedings, counsel send the client a letter to check beneficiary designations on any retirement accounts and life insurance policies).

The Plan also could have resolved this matter and protected itself if it had more detailed plan provisions. 29 U.S.C. § 1104(a)(1)(D) (plan trustees or fiduciaries are required under ERISA to discharge their duties "in accordance with the documents and instruments governing the plan."); *Curtiss-Wright*, 514 U.S. at 81 (recognizing that plan administrators must follow plan documents). AARP notes that, as a matter of best practices, some plans have amended their terms to address the numerous beneficiary designation issues that may arise. *Cf., e.g., Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 332 (7th Cir. 2000) (Judge Posner suggesting specific language which the circuit will find to confer discretion upon plans in determining eligibility for ERISA plan benefits). Some plans have included language automatically revoking all beneficiary designations upon divorce, similar to that of the Washington statute in *Egelhoff*. Some plans have adopted provisions such as:

> The divorce of the Participant and designated Beneficiary does not invalidate the beneficiary designation; the Participant must submit a change of Beneficiary designation to the Fund to remove the former spouse as a Beneficiary.

Others have stated that the plan must receive the beneficiary designation in order for the designation to be valid, and benefits will only be paid in accordance with the most recently designated Beneficiary form filed with the plan. Other plans go so far as to specify

default beneficiaries where there is no designated beneficiary and to describe precisely how payments will be made to beneficiaries who are minors. In any case, it becomes a matter of plan design, *see Black & Decker Disability Plan v. Nord*, 538 U.S. at 833; *cf. Rush Prudential HMO v. Moran*, 536 U.S. at 386, not a court's determination of fairness in a particular situation.

Such language would enable plans to establish finality concerning payment of employee benefits; prevent plans from becoming embroiled in state probate, domestic relations and other actions, thus minimizing litigation and administrative costs; and reduce the number of plans filing interpleader actions to request court determinations concerning to whom payment must be made. *See, e.g., Stickney v. Muhlenberg Coll. TIAA-CREF Ret. Plan*, 896 F. Supp. 412 (E.D. Pa. 1995). Such language would also inform participants, beneficiaries and their counsel of the plan's procedures and requirements so that they know what actions they must take, when dividing marital assets, to ensure that their intentions with respect to plan benefits will be followed.

AARP does not mean to suggest that the most probable intent of Mr. Kennedy was to designate his estate rather than his ex-spouse as his beneficiary, and that it was by mere oversight, carelessness, or lack of knowledge, that he failed to change his beneficiary designation. Nor do we suggest that these situations are uncommon. What we urge is that requiring plan administrators to use monies belonging to other participants to investigate and resolve a deceased

participant's "true intentions," and, no matter the resolution, spend more of those other participant's monies to then litigate the same question, places the burden of the participant's mistake in the wrong place. Instead, the estate should be seeking a remedy in state court by seeking to enforce the waiver and requiring the former Mrs. Kennedy to surrender other assets, if she indeed was the improper beneficiary of the plan's distribution.

CONCLUSION

For the foregoing reasons, AARP urges the Court to affirm the decision of the United States Fifth Circuit Court of Appeals.

May 9, 2008 Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-636

In The Supreme Court of the United States

KARI ELLEN KENNEDY, Independent Executrix of the Estate of William Patrick Kennedy, Deceased,

Petitioner,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DU PONT DE NEMOURS & COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, the American Benefits Council (the "Council"), The ERISA Industry Committee ("ERIC"), and the National Association of Manufacturers ("NAM") respectfully request leave of the Court to file the accompanying brief *amici curiae* in support of Respondents.

The Council is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 270 members, including E.I. du Pont de Nemours and Company ("DuPont"), are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

ERIC is a non-profit organization representing America's largest private employers, including DuPont, in a broad variety of industries. All of ERIC's members provide benchmark benefits to tens of millions of active and retired workers and their families through pension, health care, compensation, and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974, as

amended ("ERISA"), and other federal law. All of ERIC's members do business in more than one state, and many have employees in all fifty states.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers, including DuPont, in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Council, ERIC, and the NAM limit their *amicus* participation to cases that are of great significance to their member companies. This is such a case. The rule proposed by Petitioner – under which plan administrators would be required to recognize beneficiary waivers that are not contemplated in the applicable plan documentation – would wreak havoc on plan administration. Petitioner's rule would also impose enormous burdens and costs on plans and their participants and give rise to costly disputes, litigation, and the possibility of double payment of plan benefits. After a plan makes a payment to a beneficiary clearly designated pursuant to the plan document, other claims could be submitted based on extrinsic documents that could drag a plan into disputes and possibly force double payments. Such a system could well, in combination with other factors,

cause many employers not to maintain a retirement plan.

For these reasons, this case is of significant interest to the Council, ERIC, the NAM, and their member companies. The Council, ERIC, and the NAM provide a unique perspective that cannot be provided by the parties or by the other *Amici*. The three organizations are devoted to understanding and expressing the views and expertise of retirement plan sponsors across the country. No other party or *Amicus* can represent the retirement plan community in this comprehensive manner.

Respondents consented to the filing of this *amici curiae* brief, but Petitioner did not.

DATED: July 15, 2008

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans.[1] The Council's approximately 270 members, including E.I. du Pont de Nemours and Company ("DuPont"), are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

The ERISA Industry Committee ("ERIC") is a non-profit organization representing America's largest private employers, including DuPont, in a broad variety of industries. All of ERIC's members provide benchmark benefits to tens of millions of active and retired workers and their families through pension, health care, compensation, and other employee

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[1] Respondents consented to the filing of this *amici curiae* brief, but Petitioner did not. Attached is a motion requesting leave of the Court to file this *amici curiae* brief. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and other federal law. All of ERIC's members do business in more than one state, and many have employees in all fifty states.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers, including DuPont, in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Council, ERIC, and the NAM limit their *Amici* participation to cases that are of great significance to their member companies. This is such a case. The rule proposed by Petitioner – under which plan administrators would be required to recognize beneficiary waivers that are not contemplated in the applicable plan documentation – would wreak havoc on plan administration. Petitioner's rule would also impose enormous burdens and costs on plans and their participants and give rise to costly disputes, litigation, and the possibility of double payment of plan benefits. After a plan makes a payment to a beneficiary clearly designated pursuant to the plan document, other claims could be submitted based on

extrinsic documents that could drag a plan into disputes and possibly force double payments. Such a system could well, in combination with other factors, cause many employers not to maintain a retirement plan.

For these reasons, and others discussed herein, this case is of significant interest to the Council, ERIC, the NAM, and their member companies.

SUMMARY OF ARGUMENT

There are two distinct grounds on which the Fifth Circuit's judgment can and should be affirmed. First, the administrator of an ERISA plan is required by ERISA to pay benefits only to persons who are entitled to benefits pursuant to the plan document or ERISA.

The second argument on which the Fifth Circuit's judgment can be affirmed is that, pursuant to ERISA, a qualified domestic relations order ("QDRO") is the sole mechanism for the assignment of benefits in connection with a divorce or other marital dissolution. Thus, any benefit disbursements made pursuant to a domestic relations order that is not a QDRO ("non-qualified order") would violate ERISA's anti-assignment rule.

Any requirement that a plan be administered based on extrinsic documents not referenced in the plan documents would make ERISA plans extremely

difficult to administer. Moreover, any requirement based on extrinsic documents is inconsistent with ERISA and would thus undermine the congressional goals of "'nationally uniform plan administration'" and of "'minimiz[ing] the administrative and financial burden[s]' on plan administrators" with respect to ERISA plans. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148-50 (2001) (citations omitted).

For millions of American workers, ERISA plans provide a vital source of retirement income and death benefit coverage for their spouses and dependents. Given the important role that ERISA plans play in the lives of millions of America's families, the retirement plan system needs to continue to be improved by finding new and simpler ways for employers to provide retirement security for their employees. The rule proposed by Petitioner, however, would impose very large, new costs and burdens on plans. As companies determine whether to maintain existing plans or sponsor new ERISA plans, the costs and burdens imposed upon plans under Petitioner's rule would be one more factor militating against sponsorship or continued maintenance of ERISA plans.

Congress has provided a comprehensive, specific administrative regime regarding spousal rights and beneficiary designations with respect to ERISA plan benefits. Accordingly, it is clear that Congress did not intend for the courts to use their general powers to fashion a federal common law rule to require that plan administrators give effect to waivers based on extrinsic non-plan materials. Moreover, such a rule

would fly in the face of congressional intent that ERISA provide a clear mechanism for determining the payment of benefits.

ARGUMENT

The specific question before the Court is whether the Fifth Circuit was correct in concluding that a QDRO pursuant to section 206(d)(3)(B)(i) of ERISA is the only valid way a former spouse can waive his or her right to receive his or her former spouse's pension benefits from a plan.

As discussed below, we believe that a QDRO is the only valid way for a former spouse to waive his or her right to receive his or her former spouse's pension benefits from a plan. However, we think that there is a much more fundamental issue at stake, which provides an alternate means for affirming the Fifth Circuit's decision. ERISA requires plans to be administered based only on the written plan documents and other documents referenced therein. The Fifth Circuit's decision can and should be affirmed based on the application of this fundamental rule of ERISA.

Our argument below accordingly addresses both bases for affirming the Fifth Circuit's decision, starting with the more fundamental means of doing so.

I. REQUIRING PLAN ADMINISTRATORS TO RECOGNIZE WAIVERS BASED ON FEDERAL COMMON LAW WOULD UNDERMINE ERISA'S WRITTEN PLAN RULE AND THE IMPORTANT INTERESTS SUCH RULE SERVES.

ERISA requires that a plan be "maintained pursuant to a written instrument" and administered "in accordance with the documents and instruments governing the plan." 29 U.S.C. §§ 1102(a), 1104(a)(1)(D). ERISA further requires that a plan "specify the basis on which payments are made to and from the plan." 29 U.S.C. § 1102(b)(4). As the Court recognized in *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001), these requirements serve "[o]ne of the principal goals of ERISA," *i.e.*, to "enable employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits'" (citation omitted). Accordingly, the plan administrator is required by ERISA to pay death benefits only to a person who is (i) designated as a beneficiary pursuant to the plan document,[2] or (ii) deemed to be a beneficiary by operation of ERISA. To require a plan administrator to give effect to a designated beneficiary's waiver as a matter of federal common law would undermine the

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[2] A beneficiary may be designated pursuant to the plan document in several ways, such as (i) by a designation by a participant as provided in the document, (ii) by an express designation under the plan terms, or (iii) by a QDRO pursuant to the QDRO provision in a retirement plan.

rule in ERISA that plans be administered in accordance with written plan documents. As discussed below, any requirement that a plan be administered based on extrinsic documents not referenced in the plan documents would make ERISA plans very hard to administer.

A. THIS COURT HAS RECOGNIZED THAT ERISA REQUIRES THAT BENEFITS BE PAID TO BENEFICIARIES IN ACCORDANCE WITH THE TERMS OF THE WRITTEN PLAN DOCUMENT.

As this Court recognized in *Boggs v. Boggs*, 520 U.S. 837, 850-51 (1997), and *Egelhoff*, 532 U.S. at 147, the requirement that a plan be administered in accordance with the written plan terms also applies to beneficiaries. For purposes of ERISA, a "beneficiary" is a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). In *Boggs*, the Court held that ERISA preempted a state community property law that allowed a non-participant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits to persons not otherwise designated as beneficiaries by the participant or under the terms of the written plan document. *See* 520 U.S. at 848-51. In so doing, the Court refused to, "through case law, create a new class of persons for whom plan assets are to be held and administered," in part

because "*[t]he statute is not amenable to this sweeping extratextual extension.*" *Id.* at 850 (emphasis added).

Similarly, in *Egelhoff*, the Court held that a state law that automatically revoked certain spousal beneficiary designations following a divorce was preempted by ERISA, as applied to ERISA-governed plans. *Egelhoff*, 532 U.S. at 150. The Court reasoned that the law interfered with the statute's goal of "nationally uniform plan administration" because it required that plan administrators look beyond the terms of their plans to the laws of the fifty states to determine beneficiary status. *Id.* at 148-49. Accordingly, the Court recognized that unless preempted, the law would prevent plan administrators from making "payments simply by identifying the beneficiary specified by the plan documents," and "would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators – burdens ultimately borne by the beneficiaries." *Id.* at 148-50.

The reasoning applied by the Court in *Boggs* and *Egelhoff* is equally applicable to the instant case: to require a plan administrator to give effect to a waiver not contemplated by the written plan document[3] is

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[3] As discussed in the *amicus curiae* brief of the United States, retirement plans may well permit qualified disclaimers of death benefits under section 2518(b) of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 2518(b). However, that is not an issue in this case, as Petitioner has never contended that the "waiver" was a qualified disclaimer. On the contrary, the

(Continued on following page)

inconsistent with ERISA and would thus undermine the congressional goals of "'nationally uniform plan administration'" and of "'minimiz[ing] the administrative and financial burden[s]' on plan administrators" with respect to ERISA plans. *Id.* at 148-50 (citations omitted).

B. REQUIRING PLAN ADMINISTRATORS TO FIND AND REVIEW EXTRINSIC EVIDENCE WOULD IMPOSE ENORMOUS BURDENS AND COSTS ON PLAN ADMINISTRATORS.

To require plan administrators to recognize a waiver based on federal common law (as opposed to valid plan provisions) would impose enormous burdens and costs on plans, which, as the Court recognized in *Egelhoff*, are "ultimately borne by the beneficiaries." *Id.* at 149-50.

Under the rule proposed by Petitioner, plan administrators would be required to find and review any extrinsic document that could potentially affect the distribution of plan benefits, such as divorce decrees, wills, and settlement agreements, among others. *See Estate of Altobelli v. IBM Corp.*, 77 F.3d 78, 82-83 (4th Cir. 1996) (Wilkinson, J., dissenting) (stating that plan administrators should not be "[f]orc[ed] . . . to examine a multitude of external documents that

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issue in this case involves a purported waiver not contemplated in the applicable plan documents.

might purport to affect the dispensation of benefits").[4] Such a task would be an enormous undertaking without any real potential for comprehensive success. Under Petitioner's proposed rule, any time that a plan participant dies, the plan administrator would appear to have a fiduciary duty to seek all relevant information regarding the proper recipients of the participant's benefits. In the absence of such a search, a plan administrator would run a material risk of having to pay double benefits, once to a designated beneficiary and once to a party who subsequently demonstrates that the beneficiary waived his or her benefit. In the absence of a diligent search for such other party, the plan fiduciary could be liable for the second payment.

At a minimum, the plan administrator would need to send out inquiries to all of the participant's family members and designated beneficiaries requesting all documents related to the financial relationship among the parties to determine if any such documents could be interpreted to constitute a waiver of plan benefits by beneficiaries. (Asking only designated beneficiaries may fail to uncover documents that a beneficiary may not want to disclose.) Such an inquiry would be extremely problematic for several

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[4] Notably, pursuant to section 206(d)(3) of ERISA, 29 U.S.C. § 1056(d)(3), in order for a domestic relations order to qualify as a QDRO for purposes of ERISA, the domestic relations order must be delivered to the plan administrator and subsequently determined by the plan administrator to constitute a QDRO.

reasons. First, a plan administrator will, in many cases, not know the identities or addresses of all of a participant's family members. Second, there is no assurance that needed responses would be forthcoming. Third, such inquiries – requesting numerous financial documents from the participant's family – would constitute a very intrusive invasion of privacy, an invasion that is unnecessary when plan determinations are based exclusively on plan documents and other documents referenced therein, as contemplated by ERISA.

In addition, sending out these inquiries may not be enough. A plan administrator may well have a duty to seek out any court records of orders or settlements that could have a bearing on whether a beneficiary has waived a death benefit, thus requiring that plan administrators search in one or more, and potentially all, jurisdictions within the United States. Again, such a search would be unwieldy and expensive, as well as difficult to conduct with any certainty of success.

Under the rule proposed by Petitioner, any failure by a plan administrator to find extrinsic documents could subject the plan to costly disputes, litigation, and the possibility of double payment of plan benefits. Even if a plan administrator had the requisite knowledge of relevant extrinsic documentation, in many instances the administrator would likely have to seek legal review of the extrinsic documentation to determine its validity and effect, if any, on the disbursement of plan benefits. Reviewing each

extrinsic document could require the plan to expend significant plan resources, which, in turn, reduces the amount of plan assets available to pay benefits to participants and beneficiaries.

As aptly noted in the *amicus curiae* brief of the United States, a plan analyzing extrinsic documents "would have to decide among the 'myriad of tests' courts have developed to determine whether language in a domestic relations order is sufficient to constitute a valid waiver." Brief for United States as *Amicus Curiae* at 27 (citation omitted). Also, in many cases, non-qualified orders and other purported waivers contained in settlements, wills, or other documents, are based on state law rules and incorporate specific terms of art that have special meaning under individual state laws. For the average plan administrator, let alone for a plan administrator of a plan that covers employees in more than one state, having to give effect to non-qualified orders and other documents based on individual state laws would impose substantial costs and burdens on the plan. In contrast, ERISA's QDRO provision provides a detailed and uniform framework for the administration of QDROs. *See* 29 U.S.C. § 1056(d)(3)(C)-(D). When a domestic relations order is delivered to a plan administrator for a QDRO determination, the plan administrator can compare the order to a uniform and enumerated set of requirements provided for under ERISA and can require clarity with respect to how the order applies to the plan.

In addition to the foregoing, even if all of the above issues could be resolved with respect to the use of extrinsic non-plan documents, the timing of death benefit payments from plans could be very adversely affected. Death benefit payments would have to be delayed – at least for months – while the factual and legal inquiries described above are conducted. This would be tremendously disruptive for the rightful beneficiaries who would be deprived of money that they may need to address the costs and burdens triggered by the participant's death.

Despite their best efforts, many plan administrators likely would be drawn into family disputes in which they have no interest. As noted above, many purported waivers will remain undiscovered. And basing plan decisions on advice from legal counsel will not prevent any "losing" party from disputing the conclusion reached by the plan's legal counsel. In short, despite all the time and expense associated with the process described above, far more time and money will be spent in resolving inevitable controversies. *See generally*, Charles Dickens, *Bleak House* (Norman Page ed., Penguin Books 1971) (1853) (describing the fate of those involved in the fictional case of *Jarndyce v. Jarndyce*, a family locked in a dispute over an inheritance that endlessly drags on, consuming all of the disputed assets in legal fees).

C. INTERPLEADER IS NOT A WORKABLE SOLUTION FOR PLANS.

Some have suggested that interpleader is the answer to the above challenges faced by plan administrators. The argument is that at the first sign of any controversy, a plan can simply deposit benefits with a court and let the court make determinations regarding the rightful recipient of the benefits. Unfortunately, for several reasons, this is clearly not the right answer.

First, and fundamentally, interpleader is not a solution when the plan administrator is not aware of a potential dispute. So the interpleader approach does not address the need to conduct expensive, time-consuming, and intrusive searches for extrinsic documents.

Second, interpleader actions can be a substantial burden on the court system. Under ERISA, entitlement to death benefits can generally be determined simply and easily by relying on the plan documents and other documents (such as beneficiary designations or QDROs) referenced in the plan documents. Under Petitioner's rule (using the interpleader approach), extrinsic documents become relevant and, at the first hint of controversy, the courts must decide benefit entitlement. In light of the huge number of death benefits payable from plans, this is a potentially enormous burden on the court system.

Third, use of interpleader on a regular basis will exacerbate the timing problem noted above. It may be

years before rightful beneficiaries receive their benefits while these disputes drag on through the courts. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Olympia Holding Corp.*, 140 F. App'x. 860, 861 (11th Cir. 2005) (interpleader filed eleven years prior to court decision); *Trs. of Dirs. Guild of Am. v. Tise*, 234 F.3d 415, 418 (9th Cir. 2000) (interpleader filed five years prior to court decision); *Septembertide Publ'g, B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 677 (2d Cir. 1989) (interpleader filed at least two years prior to court decision); *Prudential Ins. Co. of Am. v. Boyd*, 781 F.2d 1494, 1496 (11th Cir. 1986) (interpleader filed at least three years prior to court decision).

Fourth, having the courts make benefit determinations on a regular basis is contrary to the appropriate structure established by ERISA. Under ERISA, plan fiduciaries with intimate knowledge of the plan make benefit determinations based on plan terms with which they are very familiar. It is not consistent with ERISA to substitute the court system for plan fiduciaries as the arbiter of benefit entitlement on a regular basis.

Fifth, contrary to what Petitioner suggests, interpleader is not a painless and inexpensive alternative for plans. In many instances, the plan or other stakeholder may be required by the court to remain involved as a formal party or otherwise for the duration of an interpleader action. *See, e.g.*, *Tise*, 234 F.3d at 427; *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61, 63 (5th Cir. 1976); *United States v. Wilson*, 333 F.2d 147, 149 (3d Cir. 1964). In some cases, a plan

may feel obligated to remain a party or otherwise involved in the action, due to the plan's interest in ensuring that its benefits are delivered in a manner consistent with the purposes underlying the plan. As interpleader actions play out in trial court and/or on appeal, often over the course of a multi-year period, the financial expenses borne by the stakeholder, *e.g.*, the plan and its participants (whether or not a party to the action), can become quite substantial. Additionally, although stakeholders are eligible to have incurred costs reimbursed by order of the court, interpleader is an equitable proceeding, and thus courts have substantial discretion in awarding costs. *See, e.g.*, *Tise*, 234 F.3d at 426-28; *Rhoades v. Casey*, 196 F.3d 592, 603 (5th Cir. 1999); *Septembertide*, 884 F.2d at 683; *Ferber Co. v. Ondrick*, 310 F.2d 462, 467 (1st Cir. 1962). Using this discretion, courts have frequently held that stakeholders are entitled to less than their full costs. *See, e.g.*, *Travelers Indem. Co. v. Israel*, 354 F.2d 488, 490 (2d Cir. 1965); *Unum Life Ins. Co. v. Kelling*, 170 F. Supp. 2d 792, 794 (M.D. Tenn. 2001).

For example, courts have often determined, almost *a priori*, that awards should be "of a relatively small amount, simply to compensate for initiating the proceedings," and thus should not encompass overall costs incurred during the litigation process. *Ferber*, 310 F.2d at 467. Since awards are typically charged to the interpled fund itself, courts may be reluctant to significantly drain plan benefits through a cost award. *See, e.g.*, *Tise*, 234 F.3d at 427; *Unum*, 170

F. Supp. 2d at 795. Accordingly, any cost award may fall substantially below the total expenses incurred by the plan. *See, e.g.*, *Tise*, 234 F.3d at 427 (holding that the party that initiated interpleader was eligible to receive cost award equal to $3,000 of $97,000 of incurred expenses); *Landmark Chems., S.A. v. Merrill Lynch & Co.*, 234 F.R.D. 62, 63-64 (S.D.N.Y. 2005) (holding that the stakeholder bears $16,708.30 of $67,708.30 incurred because court found number of hours billed "somewhat excessive"); *Estate of Ellington v. EMI Music Publ'g*, 282 F. Supp. 2d 192, 194-95 (S.D.N.Y. 2003) (holding that the stakeholder bears $28,000 of $37,000 incurred); *Unum*, 170 F. Supp. 2d at 793-95 (denying in whole the $4,967.58 of costs incurred by the stakeholder); *Chem. Bank v. Richmul Assoc.*, 666 F. Supp. 616, 619-20 (S.D.N.Y. 1987) (holding that the stakeholder bears $18,368 of $24,868 incurred).

In short, the use of interpleader as a regular answer to potential death benefit controversies (1) does not help with disputes that a plan administrator is unaware of; (2) would create a large burden on the court system; (3) would severely delay the payment of plan benefits; (4) would substitute the courts for the plan administrators as the arbiters of plan benefit disputes; and (5) would dramatically increase plan costs and burdens. Thus, interpleader should not be looked upon by the Court as a meaningful "backstop" or safeguard with respect to problems imposed by a waiver rule based on non-plan extrinsic materials.

D. A LARGE INCREASE IN PLAN COSTS AND BURDENS WILL DISCOURAGE COMPANIES FROM MAINTAINING PLANS.

When Congress enacted ERISA, it chose not to mandate employer sponsorship of ERISA-governed retirement or pension plans. Accordingly, employers are under no obligation to sponsor any such plan or provide any such benefit but may do so at their discretion. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (stating that "ERISA does not mandate that employers provide any particular benefits"); *DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 972 (6th Cir. 2006) ("The statute does not require employers to provide any particular benefits to their employees, but sets forth uniform, federal standards that control their administration.").

Congress recognized that employers are more likely to sponsor an ERISA plan if the plan can be administered in an efficient fashion, so as to minimize unnecessary costs borne by both sponsors and participants. As noted by this Court in *Fort Halifax Packing Co. v. Coyne*, "[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation," which could, in turn, "lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." 482 U.S. 1, 11 (1987).

The rule proposed by Petitioner would replace a comprehensive and clearly defined administrative

scheme regarding beneficiary designation – one based on the predictability and certainty of the written plan document – with an extremely unwieldy, costly, and time-consuming system requiring plans to find and analyze extrinsic information. Our country is already facing significant public policy challenges as we try to increase retirement plan coverage, especially among employees of small businesses. For example, as of 2006, only 26.6% of full-time workers in businesses with fewer than twenty-five employees were employed at firms that sponsored a retirement plan. *See* Patrick Purcell, Pension Sponsorship and Participation: Summary of Recent Trends 7 (Cong. Research Serv., CRS Report for Congress Order Code RL 30122, Sept. 6, 2007), *available at* http://assets.opencrs.com/rpts/RL30122_20070906.pdf. Thus, if plan administration costs and burdens were to substantially increase, as they would under the rule proposed by Petitioner, we are quite concerned that this, combined with other factors, could result in fewer companies sponsoring retirement plans, especially small businesses where the coverage problem is the most acute. The retirement plan system needs to continue to be improved by finding new and simpler ways for employers to provide retirement security for their employees. We do not need to go backwards, to undo basic principles of ERISA, and to create large new burdens and costs that discourage plan sponsorship.

E. COMPREHENSIVE LEGISLATION ELIMINATES THE NEED FOR FEDERAL COMMON LAW.

Contrary to Petitioner's proposed rule, Congress has provided a detailed and comprehensive administrative regime regarding spousal rights and beneficiary designations with respect to ERISA plan benefits. Moreover, as noted above, Congress has been careful to ensure that such regime adheres to the important principle that plan administrators only pay benefits to "participants" or "beneficiaries," as defined for purposes of, and in accordance with, written plan terms. To this end, ERISA plans provide a standard method for participants to void an existing beneficiary designation – by filing a change of beneficiary form with the plan administrator. Congress never intended the courts to use their general powers to fashion a federal common law rule to require that plan administrators give effect to waivers based on extrinsic non-plan materials. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 259 (1993) (stating that "[t]he authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute") (citation omitted); *McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 245 (3d Cir. 2005) (holding that "[w]e disagree with [claimant's] argument that the situation presented by this case is not resolved by looking to the express terms of ERISA, and we therefore decline to follow the federal common law approach").

Petitioner, like the respondents in *Egelhoff*, asserts that ERISA should not be read so as to override beneficiary waivers based on federal common law. Otherwise, Petitioner asserts, ERISA would also need to be construed by the Court to prohibit federal common law from giving effect to state "slayer" statutes that otherwise operate to invalidate the beneficiary status of a person who murders a plan participant.

Despite Petitioner's cry that the "sky is falling," the issue of state "slayer" statutes and their applicability under ERISA is a distinct issue that is not before the Court in this case and thus need not be addressed. It is a distinct issue in the following respects. First, as this Court has noted, the prohibition on rewarding "slayers" is "well established in the law and has a long historical pedigree predating ERISA." *Egelhoff*, 532 U.S. at 152 (citing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)). There is no similar history upholding the use of extrinsic documents to invalidate a clear and administrable system based on plan documents. Second, there is a very significant practical difference. Participant death is obviously far more common than participant murder – especially at the hand of the designated beneficiary. Thus, whereas an ERISA plan may look to or otherwise invoke the terms of a state "slayer" statute maybe once during the plan's multi-year existence, if at all, administering death benefits with respect to an ERISA plan is for many plans a very frequent, if not everyday, occurrence. Accordingly, any possible administrative

burdens imposed by a "slayer" rule are likely to be imposed upon a plan on a much less frequent basis, if ever. In contrast, as noted above, a waiver rule, such as the one proposed by Petitioner, would impose enormous administrative burdens on ERISA plans – burdens that likely would be encountered by plans on an everyday basis.

In summary, ERISA provides a simple and comprehensive system for determining beneficiary rights. There is no reason or any legal basis to replace that system with an expensive and burdensome system that will adversely affect plans, plan participants, and retirement security generally.

II. ERISA'S ANTI-ALIENATION AND QDRO PROVISIONS REQUIRE PLAN ADMINISTRATORS TO DISREGARD NON-QUALIFIED ORDERS.

In ERISA, Congress has imposed upon plans a comprehensive and detailed set of rules to ensure that ERISA retirement plans can be administered in a uniform and consistent manner, without significant expense and burden to plans and participants and beneficiaries thereof. To that end, Congress legislated several provisions – specifically the anti-alienation and QDRO provisions – that require all non-qualified domestic relations orders to be disregarded by plan administrators. As discussed below, important policy considerations reinforce the need to follow this clear rule.

A. PURPORTED WAIVERS BASED ON DOMESTIC RELATIONS ORDERS CONSTITUTE IMPERMISSIBLE ALIENATION IN VIOLATION OF ERISA.

Congress enacted section 206(d)(1) of ERISA, the anti-alienation provision, to ensure that ERISA pension plan "benefits are actually available for retirement purposes." H.R. Rep. No. 93-807 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4670, 4734. As this Court recognized in *Boggs*, "[t]he anti-alienation provision can 'be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement.'" 520 U.S. at 851 (*quoting* John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 547 (2d ed. 1995)).

Specifically, section 206(d)(1) of ERISA states that "benefits provided under [an ERISA pension plan] may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Applicable Treasury regulations interpreting section 206(d)(1) define an "assignment" or "alienation" for purposes of this section to be a "direct or indirect arrangement . . . whereby a party acquires . . . a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which . . . may become . . . payable to the beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii).

When Congress enacted ERISA's QDRO provision, which can be found in section 206(d), Congress intended only to provide a "limited exception" to the

broad reach of ERISA's anti-alienation provision for those domestic relations orders that constitute QDROs. *See* S. Rep. No. 98-575, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2565 ("The Committee believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension, etc., plan to be divided under certain circumstances."). Specifically, section 206(d)(3)(A) of ERISA provides that the anti-alienation provision of ERISA "shall apply to the creation, assignment, or recognition of a right to *any* benefit payable with respect to a participant pursuant to a domestic relations order [unless the order is a QDRO]." 29 U.S.C. § 1056(d)(3)(A) (emphasis added). Accordingly, to the extent that a domestic relations order does not constitute a QDRO – such as the domestic relations order at issue in this case – such order cannot be given effect by the plan. To do otherwise would result in an impermissible alienation or assignment in violation of ERISA.

Significantly, Petitioner asserts that the purported waiver at issue is not an impermissible assignment in violation of ERISA, because it does not result in a transfer of benefits to a third party. Brief of Petitioner-Appellant at 8-9. Petitioner's definition of "assignment" fails to acknowledge congressional intent. As noted above, the statutory text of section 206(d)(3)(A) of ERISA makes clear that in enacting the QDRO provision, Congress intended for the anti-alienation provision to apply to *all* non-qualified domestic relations orders, regardless of whether such

orders cause a third-party transfer of ERISA benefits. Moreover, section 206(d)(3) of ERISA goes on to broadly define a "domestic relations order" to mean "any judgment, decree, or order (including approval of a property settlement) which . . . relates to the provision of . . . marital property rights to a spouse [or] former spouse." 29 U.S.C. § 1056(d)(3)(B)(ii).

The broad definition of "domestic relations order" provided by Congress, coupled with the iron-clad statement that *all* domestic relations orders that are not QDROs are subject to ERISA's anti-alienation rules, indicates that Congress intended for *all* non-qualified domestic relations orders, regardless of the existence of third-party transfers, to be subject to ERISA's anti-alienation provision. Moreover, if Congress had intended to exempt two-party transfers from the reach of ERISA's anti-alienation provision, it could have done so – for example, by defining "domestic relations orders" more narrowly to exclude two-party transfers. However, Congress chose not to do so. Accordingly, we respectfully request that the Court not override congressional intent by reading such an exemption into the statute.

Even if Congress sought to exempt two-party transfers from the reach of ERISA's anti-alienation provision when it enacted section 206(d)(1), the purported waiver at issue here would result in a third-party transfer. This is because to the extent that a named beneficiary purportedly waives his or her rights to ERISA benefits under the plan, such waiver results in the benefits becoming payable to a

third party as determined under applicable plan terms, *i.e.*, they become payable to a default or designated contingent beneficiary. Accordingly, regardless of whether two-party transfers are subject to the anti-alienation provision, there can be only one answer – that the purported waiver is subject to and prohibited by ERISA's anti-alienation provision.

B. ERISA REQUIRES PLAN ADMINISTRATORS TO DISREGARD NON-QUALIFIED DOMESTIC RELATIONS ORDERS.

To require plan administrators to give effect to purported waivers in the absence of a qualified domestic relations order – and disburse ERISA plan benefits to non-participants and beneficiaries in accordance therewith – would be inconsistent with ERISA.

Section 206(d)(3)(H)(iii) of ERISA expressly states that, in the event a plan administrator receives a non-qualified domestic relations order, the plan administrator *must* pay benefits as if there had been no such order. 29 U.S.C. § 1056(d)(3)(H)(iii) (stating that in the event of a non-qualified domestic relations order, the plan administrator "shall pay [benefits] to the person or persons who would have been entitled to such amounts if there had been no order"). By contrast, however, where the order is qualified, section 206(d)(3)(H)(ii) of ERISA requires that "the plan administrator shall pay the . . . [benefits] to the

person or persons entitled thereto [under the order]." 29 U.S.C. § 1056(d)(3)(H)(ii).

The above rules make complete sense in light of sections 404(a)(1) and 206(d)(3)(J) of ERISA. As noted above, section 404(a)(1) generally requires that a plan administrator, as fiduciary of the plan, administer the plan "solely in the interest of the participants and beneficiaries. . . ." 29 U.S.C. § 1104. To this end, Congress added section 206(d)(3)(J) of ERISA, which expressly states that an alternate payee, as provided for in a QDRO, is deemed to be a plan beneficiary for purposes of complying with the QDRO. Significantly, Congress did not include any such language with respect to third-party payments made in connection with non-qualified orders. This clearly demonstrates that a plan administrator's disbursement of benefits to a non-participant, non-beneficiary third party pursuant to a non-qualified order is prohibited by ERISA. Accordingly, to the extent that a domestic relations order is not qualified, plan administrators must disregard such order in disbursing plan benefits.

C. POLICY CONSIDERATIONS SUPPORT RULE REQUIRING MANDATORY DISREGARD OF NON-QUALIFIED ORDERS.

A contrary rule, such as that proposed by Petitioner, would wreak havoc on plan administration for many of the reasons addressed with respect to the plan document discussion. For example, a contrary

rule would elevate extrinsic information above the written plan document – information that in many instances may be unknown or otherwise unavailable to plan administrators. Accordingly, such a rule would be largely unworkable from a plan administration perspective and would impose enormous new costs and burdens on plans and their participants. Moreover, these new burdens could, in conjunction with other growing burdens, result in a significant number of employers choosing not to sponsor a retirement plan. In an era where half of American workers have less than $22,500 in total household retirement savings, we need to be enacting laws and enforcing policies that strengthen and encourage ERISA plan savings, not the other way around. *See* Press Release, Fidelity Research Institute, Fidelity Research Institute Retirement Index Finds Working Americans On Track To Replace 58 Percent Of Income in Retirement (Mar. 12, 2007) (citing retirement savings data compiled as part of Fidelity Research Institute Retirement 2007 Index) (on file with Counsel of Record). Petitioner's proposed rule would do incalculable harm to plans and plan sponsorship by injecting confusion into a system that has served its purpose well for over three decades.

Significantly, the Court's rejection of Petitioner's proposed rule would not leave Petitioner or similarly situated claimants without a remedy. For the reasons discussed above, although ERISA prohibits a plan administrator from recognizing a non-qualified order, one party to a non-qualified order may be able to

enforce the order against another party to the order under state laws based in equity or contract. Notably, because such actions would likely involve amounts already distributed from the plan, ERISA's preemption and anti-alienation provisions should not stand as an obstacle to such actions. *See, e.g.*, *Boggs*, 520 U.S. at 852 (stating that anti-alienation provision only applies to "undistributed pension benefits"). Accordingly, ERISA's preemption and anti-alienation provisions should not preclude a claimant, such as Petitioner, from suing in state court to enforce against a former spouse a non-qualified order.

In light of the express language of ERISA, as recognized previously by this Court, and the public policy considerations related thereto, there can be no doubt that a QDRO – a widely-known and widely-used arrangement – is the sole mechanism for the assignment of benefits in connection with a divorce or other marital dissolution. Thus, to the extent a participant and/or his or her non-participant former spouse fail to submit a domestic relations order to the respective ERISA plan, which is thereafter determined by the plan administrator to be a QDRO pursuant to section 206(d)(3)(G) of ERISA, any benefit disbursements must be made in accordance with existing written plan provisions, including those with respect to beneficiary designations.

CONCLUSION

For the reasons stated above, *Amici* respectfully submit that this Court should affirm the decision of the Fifth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND

The Western Conference of Teamsters Pension Trust Fund (the "WCT Fund" or "Fund")[1] is a jointly administered trust maintained pursuant to Section 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). The WCT Fund administers the Western Conference of Teamsters Pension Plan (the "WCT Plan" or "Plan"), an employee pension benefit plan under Section 3(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1002(2), and a "multiemployer plan" as defined in Section 3(37) of ERISA, 29 U.S.C. § 1002(37). With more than $30 billion in assets, more than 5,000 contributing employers, and more than 600,000 participants and beneficiaries spread amongst all fifty states,[2] the District of Columbia, several U.S. territories, and foreign countries, the WCT Fund is the largest multiemployer pension fund in the country.[3]

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2. The WCT Plan's participating employers and active participants are located in thirteen western states: Alaska, Arizona, California, Colorado, Idaho, Hawaii, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming.

3. The WCT Fund participated as amicus curiae in another ERISA case that presented related issues to this Court. See *Egelhoff v. Egelhoff*. No. 99-1529.

The WCT Fund processes more than 20,000 benefit claims each year, about one-third of which involve claims payable as a result of the death of a participant. In such cases, the terms of the WCT Plan provide that the WCT Fund will pay such benefits in accordance with a beneficiary designation card on file, a designation contained in an application for retirement benefits, or, if neither exists, pursuant to the beneficiary preference provisions of the WCT Plan. Thus, the WCT Plan administrators have a clear method for paying benefits and complying with ERISA's mandate that a plan be administered according to the terms of its governing documents and instruments.

Because a number of courts have held that ERISA plans must give credence to an ex-spouse's waiver of benefit entitlement under certain conditions, however, the WCT Plan administrators have frequently been confronted with the dilemma of whether to adhere to the Plan's governing documents and instruments or follow the reasoning of those courts that have embraced the waiver doctrine. Both choices expose the Fund to possible liability if a court ultimately determines that the Fund chose wrongly (as the District Court determined the Respondent plan did in this case). As a result, the WCT Fund on such occasions has been forced to engage outside counsel and initiate the process of interpleading the benefit amounts. Interpleader, however, is not an effective solution, because the WCT Fund (as well as the competing claimants) must incur litigation costs that are often not recoverable. Moreover, the WCT Fund may often not even be aware of the existence of a beneficiary's purported waiver lurking in a non-qualified domestic relations order, because the

parties never presented it to the Fund for approval, and, being a multiemployer fund, the WCT Fund lacks the detailed personnel records and familiarity with participants that might at least give a single-employer plan sponsor knowledge of a participant's marital history. As a result, under a common-law waiver regime, the WCT Fund risks paying benefits to the "wrong" beneficiary every time it pays death benefits to an ex-spouse beneficiary.

Thus, the WCT Fund has a great stake in the outcome of *Kennedy v. Dupont*, and, as the administrator of the country's largest multiemployer plan, it is in a unique position to highlight for the Court the administrative burdens and added costs that the waiver doctrine would impose on pension plans. Accordingly, the WCT Fund submits this brief amicus curiae in support of Respondents and urges that this Court affirm the decision of the Fifth Circuit.

II. SUMMARY OF ARGUMENT

The WCT Fund endorses, and will not restate, Respondents' thoroughly-briefed arguments that (1) the Fifth Circuit was correct in concluding that a waiver is an impermissible assignment or alienation of benefits; (2) an ERISA plan may not recognize a non-qualified domestic relations order (a "DRO"), and, in the divorce context, a qualified DRO (a "QDRO") is the only valid way that a divorcing spouse-beneficiary can relinquish her rights; and (3) even assuming that a waiver is not a prohibited assignment or alienation, an ERISA plan administrator is not required to give effect to a waiver that conflicts with governing plan documents.

In ultimately resolving these issues, the WCT Fund urges the Court to give due consideration to the significant burdens that would be imposed on plan administrators by a federal common law regime requiring the recognition of purported waivers contained in non-qualified DROs – issued by courts of the fifty states – over unrevoked spousal beneficiary designations. These burdens are markedly different in kind and degree from the burdens of administering QDROs – a fact that has been overlooked by those courts that have all too readily embraced the waiver doctrine while dismissing any such administrative concerns.

Unlike a QDRO, which a plan administrator measures against a well-understood list of criteria and which is created with the participation of the affected parties as well as the plan, a non-qualified DRO containing a purported waiver requires the administrator to measure the waiver's validity against an evolving set of subjective standards. This requires an increased role from plan counsel, adding to the costs of plan administration and clogging the federal courts with ever more frequent interpleader actions. There are only two methods of paying these additional costs: either employers absorb them (through increased contributions) as the price of electing to provide benefit plans or participants bear them in the form of reduced benefits and plan reserves. These added costs can easily be avoided if courts do not expand the obligations of plan administrators beyond those intended by Congress, which plan administrators are well-equipped to perform: namely, administer plans in accordance with their governing documents and instruments.

Such a circumscribed role for plan administrators would benefit participants and their beneficiaries not only by preserving plan assets for their intended use, but also by providing the greatest possible degree of predictability. Divorcing participants can, and will, change beneficiary designations, or obtain QDROs, if this Court makes clear that they must do so to effectuate their intent. Congress has already provided a fully adequate legal structure, and there is, therefore, no need for courts to fashion federal common law addressing the validity of waivers in the face of an unrevoked beneficiary designation.

III. ARGUMENT

A. A Rule Requiring Benefit Plans To Look Beyond Their Governing Instruments and Documents In Administering Benefit Claims Is Impracticable.

To appreciate why a common-law waiver regime is unworkable, it is helpful to understand how the Fund currently processes benefit claims and QDROs, and how a common-law waiver doctrine would affect the Fund's practices.[4]

---

4. The authors of this brief, who serve as the WCT Fund's regular outside counsel, advise many plan sponsors of employee pension benefit plans, both multiemployer and single employer, in connection with their administration of benefit claims and QDROs. Although the WCT Fund, as the largest multiemployer pension plan in the United States, has by far the largest volume of QDROs of any of these plans, the administrative procedures all of these plans use to handle benefit claims and QDROs are similar in all material respects, and a decision by this Court validating the waiver doctrine would have a similarly adverse impact on those plans and their practices.

The WCT Plan makes clear that benefits payable upon the death of a participant must be paid to the participant's validly designated beneficiary, or, if no validly designated beneficiary survives the participant, then according to the WCT Plan's preference scheme.

Following the mandate of the Plan document is a relatively straightforward exercise in plan administration. For cases in which the WCT Fund has a beneficiary designation card on file, death benefits are processed in the following three simple steps:

- One or more claimants send the WCT Fund an application for the benefits.

- The WCT Fund determines which claimant is the participant's designated beneficiary by referencing the participant's most recent beneficiary designation on file with the Fund and then requiring the claimant(s) to produce birth certificates or other records establishing their identity as the person(s) named on that beneficiary designation.

- The WCT Fund pays benefits to the designated beneficiary.

If this Court condones the creation of a federal common-law waiver doctrine, the processing of many death benefits claims will become significantly more complex. The administrators will need to undertake several additional steps to determine the proper recipient of the participant's death benefits. The

distribution process would then entail each of the following steps:

- One or more claimants would send the WCT Fund an application for the death benefits.

- The WCT Fund would determine which claimant is the participant's designated beneficiary by referencing the participant's most recent beneficiary designation on file with the Fund and then requiring the claimant(s) to produce birth certificates or other records establishing their identity as the person(s) named on that beneficiary designation.

- The WCT Fund would evaluate any proffered evidence of waiver of benefits under the evolving common law standards. The WCT Fund might also independently investigate the marital history of the participant in an effort to determine whether any evidence of waiver exists. This would likely require the assistance of WCT Fund's counsel.

- The WCT Fund, with the assistance of counsel, would attempt to determine whether the beneficiary designation remains effective or is nullified by a waiver under federal common law. If the validity of the waiver is contested, the WCT Fund would in all likelihood advise the parties that it intends to file an interpleader action.

- Only if the WCT Fund is able to identify with certainty the correct recipient of the benefits, and the validity of any waiver under federal common law is uncontested, would the WCT Fund pay the benefits.

In the process outlined above, plan administrators would be forced to make determinations, entirely divorced from the plan documents, of such factors as the "voluntariness" and "good faith" of the purported waiver, *e.g.*, *Brandon v. Travelers Inc. Co.*, 18 F.3d 1321, 1327 (5th Cir. 1994), (elements of common-law waiver satisfied), *cert. denied*, 513 U.S. 1081 (1995), and whether the waiver specifically terminated the particular rights in question, *e.g.*, *Melton v. Melton*, 324 F.3d 941, 945 (7th Cir. 2003) (elements of common-law waiver *not* satisfied). ERISA plan administrators, however, have no particular ability to determine voluntariness or good faith, and they lack the legal expertise to determine confidently in every case whether a waiver terminates the rights at issue with sufficient specificity. Congress cannot have intended for them to be charged with such responsibilities.

Some courts favoring a common law regime (and Petitioner as well) have contended that, because plan administrators already go beyond the plan documents when they determine whether domestic relations orders meet the requirements of a QDRO, determining the validity of a waiver cannot be all that burdensome. *See, e.g.*, *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275, 282 (7th Cir.) (en banc), *cert. denied*, 498 U.S. 820 (1990); *Keen v. Weaver*, 121 S.W.3d 721, 724-5 (Tex.), *cert. denied*, 540 U.S. 1047

(2003). Such reasoning ignores the critical distinctions between QDROs and waivers, however, and their significantly differing impact on plan administration.

When a DRO is submitted to an ERISA plan, the plan administrator may look to a single, uniform set of requirements to determine whether the order may be a QDRO. ERISA Section 206(d)(3), 29 U.S.C. § 1056(d)(3), enumerates these requirements, and the plan administrator generally has little difficulty determining if they have been met: the DRO must "clearly specify" (1) the name and last known mailing addresses of the participant and each alternate payee covered by the order; (2) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined; (3) the number of payments or period to which such order applies, and (4) each plan to which such order applies. In addition, the DRO may not require a plan to provide (1) any type or form of benefit, or any option, not otherwise provided under the plan; (2) increased benefits (on an actuarial basis); or (3) benefit payments to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a QDRO. Making each of these determinations generally requires the plan administrator to examine only two documents – the plan and the DRO – and implicates the plan administrator's particularized knowledge of plan provisions.

Moreover, ERISA places the onus of crafting a DRO worthy of QDRO status, and of modifying a DRO found not to be worthy, on the *participant and his or her*

spouse – not on the plan administrator. Once the plan administrator has notified the parties that their DRO is deficient, the plan need not take any further action – it is the *parties'* responsibility to seek and obtain a modified order from the court that ultimately satisfies the QDRO requirements. Finally, the genesis of a QDRO takes place in the context of ordinary plan administration, rather than in the benefit claim process – if there is any doubt about the meaning of the language of the DRO, the parties have the opportunity to clarify the DRO with the plan administrator's input, and, except in extremely rare circumstances, the plan administrator's determination of whether the DRO meets the QDRO requirements will not result in litigation.[5]

The relatively limited demands and noncontroversial decision making that the QDRO process requires of the

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5. Since the Retirement Equity Act of 1984 introduced the concept of a QDRO, the WCT Fund has been presented with and reviewed several thousand domestic relations orders. In many of those instances, the WCT Fund initially determined that the order did not satisfy the QDRO requirements and the parties went back to court to obtain a revised order. In that entire time, the WCT Fund has had to become actively involved in court proceedings to resolve a dispute over a domestic relations order's status as a QDRO only a handful of times. By contract, of the dozen or so cases that the WCT Fund has seen in the past few years in which a preference beneficiary has raised a defense of waiver to a claim to death benefits by a former spouse designated as beneficiary by the participant, the WCT Fund has been required to initiate interpleader proceedings or at least retain counsel to communicate with the disputing claimants in an attempt to resolve their claims in virtually every case.

plan administrator contrast sharply with the investigative, and ultimately determinative, roles a plan administrator must assume in evaluating the validity of a waiver under a federal common law regime. Unlike the QDRO situation, determining the validity of a waiver takes place in the context of the benefit claims process, and, since the participant has died, the plan administrator has no opportunity to work with the parties to modify language or otherwise clarify the parties' intent in light of evolving federal common law standards.[6] Once the plan makes a decision about the validity of the waiver and pays benefits to one claimant rather than another, then it is at risk of being ordered by a court to pay the same benefits to the competing claimant in the future. No comparable risk accompanies the plan administrator's decision making in QDRO processing.[7]

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6. It is hardly inconceivable to think that a deceased participant in some cases might have intentionally maintained his ex-spouse as his designated beneficiary; once he is deceased, however, conclusive determination of such intent is impossible and should be beyond the province of a plan administrator for this very reason.

7. If the Court nevertheless believes that federal common law is necessary to determine the validity and enforceability of waivers, then the doctrine should follow the congressionally-endorsed QDRO model, which is familiar and workable for plan administrators, rather than drawing upon state law waiver doctrines. A plan administrator could, with relative ease, determine that a DRO purporting to waive spousal benefits was sufficiently clear and consistent with QDRO requirements so as to be granted QDRO status. For example, the court order encompassing the purported waiver would include: (1) the

(Cont'd)

Indeed, in a common law regime, the only sure (and most prudent) way that the plan has to avoid the risk of having to pay the benefit to more than one person is to interplead the funds as soon as any question arises about a possible waiver and let a court resolve the issue. Filing interpleader lawsuits, however, is not a panacea. While attorneys' fees are ostensibly available to a plaintiff

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(Cont'd)
name and last known mailing addresses of the participant and the spouse or ex-spouse; (2) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee – i.e., zero; (3) the number of payments or period to which such order applies – i.e., all payments, and (4) the specific plan or plans to which the order applies.

A federal common law regime based on the QDRO model would be consistent with the principle that, in developing a body of federal common law under ERISA-regulated plans, courts must look "at the policy of the legislation and fashion[] a remedy that will effectuate that policy." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985). *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (holding that in allowing courts to develop a federal common law of rights and obligations under ERISA-regulated plans, Congress "expected that the courts will . . . bear[] in mind the special nature and purpose of employee benefit plans"). *Cf. American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (holding that federal common lawmaking in admiralty "is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field"); *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) ("[t]he substantive law to apply in suits under § 301(a) [of the LMRA] is federal law, which the courts must fashion from the policy of our national labor laws").

initiating an interpleader suit,[8] in cases involving a relatively small benefit, the recovery of attorneys' fees from the stake could consume the entire benefit. The Fund's experience is that, while courts may often view the filing of an interpleader as almost ministerial in nature, with little in the way of attorneys fees required, the reality is often quite different. *See, e.g., First Trust Corp. v. Bryant*, 410 F.3d 842, 843-57 (6th Cir. 2005) (reversing district court award of $53,000 in attorney fees to interpleader plaintiff and ordering fee award for claimant).[9] In bringing an interpleader action concerning relatively small sums, the claimants are often not represented by counsel, and the plan's counsel must locate and serve all of the individual claimants (often numerous and difficult to serve), as well as bring the action through the pretrial process that federal courts generally require (including mandatory nonbinding alternative dispute resolution) before a plan can even file a motion for discharge. A plan's legal fees in initiating and bringing an interpleader action to the point at which the plan may be discharged frequently can substantially exceed the amount of legal fees a court is willing to allow as a claim against the interpleaded funds. *See, e.g., Metropolitan Life Ins. Co. v. Billini*, No. Civ S-06-02918

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8. Courts have discretion to award attorney fees to a disinterested stakeholder in an interpleader action under their inherent equitable powers. *See, e.g., Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984); *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 22 (5th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993).

9. *See also First Trust Corp. v. Bryant: Interpleader as Villainy*, [Aug./Sept. 2005] 13 ERISA Lit. Rep. (Glasser) No. 3, pp. 8-13.

WBS KJM, 2007 WL 4209405 at *3 (E.D. Cal. Nov. 27, 2007) (noting that fee awards in interpleader actions by insurance company stakeholder are "typically modest."). As a practical matter, the plan administrator may be required to charge the expenses to the plan or the plan sponsor rather than recover them from the interpleaded benefits. While claimants are not required to retain counsel, those who do incur additional expense, which also may drastically diminish or even eclipse the benefit at issue. In the end, filing an interpleader lawsuit can, in effect, sacrifice some or all of the contested benefit.[10]

B. In Many Instances, Plan Administrators Will Be Unable to Determine the Correct Beneficiary Under Federal Common Law

Forcing plan administrators to become knowledgeable about federal common law will entail determinations that can often be difficult, if not impossible, for a plan administrator to make with certainty. For example, some courts employing federal common law consider the parties' underlying relationship in assessing the pivotal issues. Courts that have engaged in such subjective analyses make clear that a plan administrator cannot reliably predict who is entitled to receive plan benefits.

For example, in *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir.), *cert. denied*, 516 U.S. 868 (1995), the Eighth Circuit explained that a property settlement agreement may effectively revoke a beneficiary designation, provided

10. *See* Brief for Respondents, at 44, n.14.

the agreement specifically divests the former spouse's rights as a plan beneficiary. However, having announced that rule, *Mohamed* examines not only the terms of the divorce agreement, but also the facts surrounding the divorce, finding the facts "especially compelling." *Id.* at 916. *Mohamed* notes that the former wife (and designated beneficiary) left her husband as a result of his being diagnosed with Alzheimer's disease. "Once [the husband] was diagnosed with the disease, [the wife] could not get away fast enough, and she never looked back. We do not believe it is putting too fine a point on it to say that she abandoned him to his illness." *Id. Mohamed* then holds that the wife had waived any claim she might have had to plan benefits. *Id.*

In contrast to *Mohamed* is *National Automobile Dealers and Associates Retirement Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996). *Arbeitman* acknowledged that the language in the divorce agreement before it was similar to that in *Mohamed*. *Arbeitman*, 89 F.3d at 501. However, equitable considerations led to a different result. In particular, *Arbeitman* noted that the husband and his former wife "maintained an amicable relationship" and that the husband paid more spousal and child support than he was legally obligated to provide. *Id.* The Eighth Circuit describes this as a "vastly different situation than we faced in *Mohamed*," and held that the divorce agreement did not waive the wife's rights as the designated plan beneficiary. *Id.*

As *Mohamed* and *Arbeitman* demonstrate, regardless of whether one believes the respective decisions correctly balanced the equities and

circumstances in the two cases, such a subjective approach requires that a plan administrator do more than simply research the law. The administrator must also conduct an investigation of the facts and circumstances surrounding a divorce and then attempt to determine intent and "balance the equities" based on those facts and circumstances. This makes efficient plan administration impossible. See *Egelhoff v. Egelhoff*, 532 U.S. 141, 149 n.3 (2001) (noting that "cost of delay and uncertainty" can "thwart[] ERISA's objective of efficient plan administration").

C. Complying with Federal Common Law Is Costly

As the discussion above reflects, if ERISA plan administrators are put to the task of having to determine the validity of a waiver when making a distribution, they will routinely need to hire legal counsel to attempt to determine the validity of the waiver, and to file interpleader suits.

Only two choices exist to fund these increased fees: either employers bear the brunt of the increased costs of administering benefit plans, or the additional expenses will be borne by the plan's participants and beneficiaries in the form of reduced benefits and/or lowered plan reserves. Neither prospect should be particularly appealing to plan participants and beneficiaries: To the extent that the employers are saddled with the additional costs, those increases may well "lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Estate of Altobelli v. International*

Business Machines Corp., 77 F.3d 78, 83 (4th Cir. 1996) (Wilkinson, C.J., dissenting) (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)). For a multiemployer plan, increased administrative costs necessarily means fewer dollars available to provide benefits – unless the collective bargaining parties agree to increase plan contributions (and, possibly, reduce wages as a result) to cover the increased costs.

In addition to the financial costs, the common-law waiver doctrine reduces participants' and beneficiaries' certainty about their rights under the plan. As this Court held in *Boggs v. Boggs*, the "assets of a plan, again with certain exceptions, are 'held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.'" 520 U.S. 833, 845 (1997) (quoting ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1)). If participants and beneficiaries know that their rights will be determined strictly in accordance with the governing plan documents, they will easily be able to determine their respective rights, without having to resort to case law.

In light of ERISA's mandate that benefit plans be administered according to their terms, a concern about equitable results is not properly addressed by different courts in different jurisdictions fashioning different rules.[11] Rather, it is the province of Congress to effect

11. The WCT Fund and other large, multi-state plans would be particularly burdened by a common law regime. ERISA plans are subject to national jurisdiction, and venue is also wide-reaching. *See* 29 U.S.C. § 1132(e)(2) (permitting (Cont'd)

any changes to ERISA in conformance with what Congress finds is appropriate national policy. That is precisely what happened when Congress passed the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426, creating a specific and narrow set of uniform rules governing ERISA plans' ability to recognize domestic relations orders.

Unless and until Congress amends ERISA with legislation which specifically addresses the effect of divorce on beneficiary designations, this Court should hold that plan administrators are to administer ERISA plans and distribute benefits in accordance with the terms of the plans and their governing instruments. Such a rule furthers ERISA's goal of establishing an efficient means of administering plans, will preserve plan assets for participant and beneficiaries, and will still enable any participant to be the master of who is to receive benefits upon that participant's death.

(Cont'd)
nationwide service of process and venue where plan is administered, where breach took place, or where a defendant resides or may be found). Thus, a regime in which different federal courts applied inconsistent standards to waivers contained in non-qualified DROs emanating from fifty different states would pose enormous problems for a large plan attempting to administer benefit claims, as well as undermine ERISA's purpose of "provid[ing] a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

IV. CONCLUSION

For the reasons stated above, the WCT Fund respectfully urges this Court to affirm the decision of the Fifth Circuit Court of Appeals in the matter of *Kennedy v. DuPont.*

Respectfully submitted,

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OPPOSITION BRIEF

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In The Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

v.

E. I. DU PONT DE NEMOURS AND COMPANY AND PLAN ADMINISTRATOR FOR DU PONT SAVINGS AND INVESTMENT PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Under ERISA, benefits provided under a pension plan cannot be assigned or alienated. 29 U.S.C. § 1056(d)(1). An express exception to this prohibition exists where a state domestic relations order is submitted to the plan and meets ERISA's detailed requirements of a Qualified domestic Relations Order ("QDRO"). 29 U.S.C. § 1056(d)(3)(A).

The narrow question presented in this case is whether the court of appeals was correct in holding that ERISA's anti-alienation provision bars the use of a state divorce decree, which is not a QDRO, to reassign pension plan benefits to participant's estate upon his death.

2. Whether both courts below erred in denying an award of attorney's fees to petitioner under ERISA pursuant to a five-factor test that has been adopted by every circuit to consider the issue and does not present a conflict among the circuits warranting this Court's review.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent E. I. du Pont de Nemours and Company states that it has no parent corporations and that there are no publicly held companies that own more than ten percent of its stock.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTION

This case involves a very narrow issue of the application of ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), which bars the direct or indirect alienation of pension benefits subject to ERISA. Specifically, the court below found that the anti-alienation provision prohibited a pension plan from treating a state divorce decree that is not a QDRO as a waiver of pension benefits of a spouse.

Each employee benefit plan covered by ERISA is classified as either a pension plan or a welfare plan. 29 U.S.C. § 1002(1), (2). ERISA's anti-alienation provision applies *only* to pension plans; it does not apply to life insurance and other welfare plans. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836-37 (1988). The parties agree that the DuPont Savings and Investment Plan ("SIP") at issue here is a pension plan and is therefore subject to ERISA's anti-alienation provision. Petitioner urges the Court to grant her petition to resolve what she contends is a division of authority on whether ERISA's anti-alienation provision prohibits a pension plan from giving effect to a beneficiary's divorce court order regarding the beneficiary's right to benefits under the pension plan.

Most of the cases that Petitioner invokes to support her assertion that there is a circuit split on this issue involve life insurance and other welfare

plans that are not subject to ERISA's anti-alienation provision. Although Petitioner also refers to circuit court cases involving pension plans, only two of them hold that the anti-alienation provision does not bar a pension plan from giving effect to a waiver by a beneficiary. Both decisions were based on the view that ERISA's anti-alienation provision did not apply to a waiver by a pension plan beneficiary. However, that view was superseded by the Court in *Boggs v. Boggs*, 520 U.S. 833, 846 (1997), which made clear that ERISA's anti-alienation provision applies to beneficiaries as well as to participants under pension plans.

ERISA allows benefits to be paid only to participants or their beneficiaries.[1] Specifically, ERISA § 403(c) requires that assets of the plan be used only for those purposes and for the payment of plan expenses. 29 U.S.C. § 1103(c). Furthermore, the Act requires the administrator-fiduciary to act solely for the benefit of the participants and their beneficiaries. 29 U.S.C. § 1104(a)(1)(A)(i); *Cent. States, Southeast*

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[1] The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. 29 U.S.C. § 1002(7). A "beneficiary" is a person designated by the participant or by the terms of the plan. 29 U.S.C. § 1002(8).

and Southwest Areas Pension Fund. v. Cent. Transp., Inc., 472 U.S. 559, 571 (1985).

STATEMENT

The Estate of William Patrick Kennedy ("Estate") seeks review of a final decision of the Fifth Circuit that ERISA's anti-alienation provision applied and that because ERISA includes detailed, careful, and comprehensive provisions for changing the beneficiaries under a pension plan – provisions that were not invoked by the parties in this case – there was no basis for creating a federal common-law rule to address an issue that Congress had already addressed in ERISA. The court of appeals also concluded that while a Qualified Domestic Relations Order ("QDRO"), 29 U.S.C. § 1056(d)(3)(B)(i), provided a means of effecting a waiver, none was filed for the SIP benefits.

Decedent, William Kennedy, was a DuPont employee and participated in its SIP. There is no dispute that the SIP is an "employee pension benefit plan," as defined by ERISA. 29 U.S.C. § 1002(2). (Pet. App. 37). In 1971, during his DuPont employment, decedent married Liv Kennedy. Decedent signed beneficiary-designation forms in 1974, identifying Liv Kennedy as the SIP's sole beneficiary. Decedent did not name a contingent beneficiary. (Pet. App. 2).

Decedent and Liv Kennedy divorced in 1994. Pursuant to the decree, Liv Kennedy agreed to be

divested of "all right, title, interest, and claim in and to . . . the proceeds therefrom, and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [decedent's] . . . employment." (Pet. App. 64-65). In 1997, a QDRO was approved by the state divorce court. It provided benefit disbursement instructions for some of decedent's non-SIP employee benefit plans. (Pet. App. 54). No QDRO for the SIP, however, was ever submitted. Both William and Liv Kennedy were represented by counsel.

Decedent retired from DuPont in 1998 and died in 2001. Although permitted to do so, decedent never executed any documents replacing or removing Liv Kennedy as the SIP beneficiary. (Pet. App. 3).

Kari Kennedy, the daughter of the decedent and Liv Kennedy, was appointed executrix of decedent's estate. By letter to DuPont, the Estate demanded the SIP funds be distributed to the Estate, claiming the beneficiary designation of Liv Kennedy was invalid. DuPont refused, relying on the SIP beneficiary designation. The Estate also requested Liv Kennedy to relinquish her SIP interest. She did not do so; instead, pursuant to requests to DuPont, Liv collected the SIP balance (approximately $400,000). (Pet. App. 3, 33).

The Estate filed this action, seeking to recover the SIP benefits by presenting an ERISA claim, under 29 U.S.C. § 1132(a)(1)(B), and a state-law breach-of-contract claim. The Estate basically claimed that Liv

Kennedy had waived her rights to the SIP benefits through the divorce decree, thus invalidating the SIP beneficiary designation, and that DuPont incorrectly distributed the SIP benefits.[2] (Pet. App. 3).

The district court, *inter alia*, granted summary judgment for the Estate on its ERISA claim, holding that the Estate was entitled to the value of the SIP benefits existing at the time of decedent's death, and for DuPont on the Estate's breach-of-contract claim, holding it was preempted by ERISA. (Pet. App. 52).

In awarding summary judgment to the Estate, the district court concluded, *inter alia*, that federal common-law applied to determine whether Liv Kennedy's executing the divorce decree waived her right to the SIP benefits, and that under federal common-law, the divorce decree constituted a valid waiver.

The district court denied DuPont's subsequent motion for judgment as a matter of law or, alternatively, a new trial. Also denied was the Estate's ERISA-based motion for attorney's fees.

The court of appeals reversed the district court's holding that there was a common-law waiver of pension benefits by Liv Kennedy. A unanimous panel of the Fifth Circuit held that ERISA's anti-alienation

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[2] DuPont filed a third-party claim against Liv Kennedy, asserting that, in the event she was not the correct beneficiary, the SIP was entitled to return of the SIP benefits. This claim was settled without any recovery to the SIP.

provision, 29 U.S.C. § 1056(d)(1), controlled because the benefits involved were pension benefits to which that provision specifically attached and that Liv Kennedy's "waiver" was an impermissible "assignment or alienation" within the meaning of the applicable Treasury Department regulations. (Pet. App. 8-9). The court concluded that there was no statutory gap that may allow a resort to a common-law theory of waiver. (Pet. App. 7). The court also concluded that the explicit exceptions to the anti-alienation provision for a QDRO did not apply here because the plan participant and beneficiary did not seek to obtain a QDRO for the SIP benefit. (Pet. App. 11).

The court of appeals also affirmed the district court's decision not to award attorney's fees to the Estate, finding that the district court had applied the correct standard and had not abused its discretion. (Pet. App. 11-14).

REASONS FOR DENYING THE PETITION

I. THERE IS NO DIVISION OF AUTHORITY ON WHETHER ERISA'S ANTI-ALIENATION PROVISION BARS A BENEFICIARY'S WAIVER OF PENSION PLAN BENEFITS.

A. The very narrow ground on which the court of appeals decided this case does not create or add to a split of authority among the courts of appeals nor does it present a question requiring a decision by this Court. In the present case, the Fifth Circuit correctly

held that the anti-alienation provision of ERISA controls and prohibits resort to a federal common-law waiver in pension benefit cases.[3] The court noted that although ERISA provides for an exception to such a prohibition through the device of obtaining a QDRO, the parties to the divorce never sought such an order for the SIP benefits at issue here. (Pet. App. 11). The Fifth Circuit's decision is consistent with the text of ERISA's anti-alienation provision, the applicable Treasury Department regulations, and this Court's precedent.[4]

There is no present division of authority among the courts of appeals as to the application of the statutory mechanism employed by the Fifth Circuit in the instant case. Petitioner relies on two out-dated decisions by the Seventh and Fourth Circuits which took the position that the ERISA anti-alienation provision did not apply to beneficiaries of a pension plan in connection with the dissolution of a marriage. (Pet. 10). However, those decisions were prior to this Court's decision in *Boggs*, 520 U.S. at 851-52, which applied the anti-alienation provision to pension plan beneficiaries.

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[3] In that the anti-alienation provision applies to more than domestic relations orders, the issue presented here is exceedingly narrow. *See Mackey, supra*.

[4] Petitioner cites to an IRS General Counsel Memorandum as authority. (Pet. 25-26). However, an internal memorandum may not be used or cited as precedent. *See* 26 U.S.C. § 6110(j)(3); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 279 n.2 (7th Cir. 1990) (en banc).

In *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 279 (7th Cir. 1990) (en banc), the Seventh Circuit found that ERISA's anti-alienation provision did not apply to a non-participating spouse's pension benefit where the waiver was given in connection with the dissolution of their marriage. The Fourth Circuit in *Estate of Altobelli v. Int'l Bus. Mach. Corp.*, 77 F.3d 78, 81 (4th Cir. 1996), adopted the Seventh Circuit's approach that the anti-alienation clause does not apply to beneficiaries. The *Altobelli* Court proceeded to apply a common-law theory of waiver to find that a former wife had given up her pension benefits under a marital settlement agreement that had been incorporated into the state divorce decree. *Id.* at 81-82.

Fox Valley and *Altobelli* do not reflect current law. Since this Court in *Boggs* settled that the anti-alienation clause *does* apply to beneficiaries, the Seventh and Fourth Circuits have not revisited or reaffirmed their prior opinions as to the applicability of the anti-alienation provision to beneficiaries, such as Liv Kennedy in this case.

Petitioner also maintains (Pet. 24, 25) that this decision is contrary to earlier Fifth Circuit decisions. However, the cases cited by Petitioner do not involve waivers in conjunction with martial dissolutions. Further, Petitioner never sought re-hearing before the Fifth Circuit to resolve this perceived conflict.

No reported decision of any circuits that have considered the application of the anti-alienation and

QDRO provisions of ERISA have found contrary to the decision before this Court. Far from creating or adding to a split of authority among the circuits, the Fifth Circuit's opinion in this case finds substantial support from a recent opinion of the Third Circuit in *McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1118 (2007). There, a retiree sought declaratory relief to direct the employer's benefit plan to recognize his former wife's waiver of beneficiary rights. The court of appeals dismissed the retiree's action finding that ERISA's anti-alienation provision applied to bar a waiver by the former wife and noted that a QDRO had not been filed. *Id.* at 250.

Petitioner's reliance on state jurisprudence is equally unavailing. Petitioner relies on state court decisions involving facts and ERISA provisions markedly different from the present case. Petitioner claims at some length that *Kennedy* conflicts with the Texas Supreme Court's decision in *Keen v. Weaver,* 121 S.W.3d 721 (Tex. 2003). (Pet. 27-32). Petitioner is badly mistaken. There is no conflict between the two decisions.

Keen involved a claim by a pension plan participant's former wife to the surviving spouse benefits that ERISA requires to be provided to the surviving spouse of a married participant. Although the participant's former wife executed a waiver in connection with the divorce, and although the court relied on the waiver in reaching its decision, the waiver was entirely beside the point: the participant in *Keen* had

subsequently remarried, and ERISA's surviving spouse provisions treat only the participant's spouse at the time of the participant's death (the second wife in *Keen)* as the participant's surviving spouse. As a result, *regardless of the waiver*, the former wife had no right to surviving spouse benefits under the pension plan.[5] There is thus no conflict between the outcome in *Keen* and the outcome in this case,[6] and the Court should not grant certiorari on the basis of Petitioner's claim that the Fifth Circuit's decision in this case conflicts with the decision in *Keen*.[7]

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[5] Under ERISA's surviving spouse provisions, where a participant dies before his benefits are paid or begin to be paid, the participant's spouse on the date of the participant's death is the spouse who is entitled to receive the surviving spouse benefits, subject to a limited number of exceptions (*e.g.*, where the spouse and the participant have been married for less than a year, where a QDRO provides otherwise, or where the spouse consents to the participant's designation of someone else as the beneficiary). *See* 29 U.S.C. § 1055; 26 C.F.R. §§ 1.401(a)-11 and 1.401(a)-20, Q&A-25-31; S. Rep. No. 575, 98th Cong., 2d Sess. 11-18 (1984).

[6] If the Texas courts are faced in the future with a case like this one, where the divorced participant does *not* remarry, it is likely that the Texas courts will follow the Fifth Circuit's decision in this case. In *Keen*, the Texas Supreme Court relied heavily on Fifth Circuit decisions. *See Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000); *Clift v. Clift*, 210 F.3d 268 (5th Cir. 2000); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994). *Keen* also relied on a number of other courts' decisions that are now obsolete as a result of *Boggs*.

[7] Other state court cases cited by Petitioner (Pet. 10) are also inapplicable. For example, *MacInnes v. Rowley*, 677 N.W. 2d 889 (Mich. CV. App. 2004) (welfare benefits case to

(Continued on following page)

In the final analysis, not only is the decision by the Fifth Circuit not part of a split of authority among the circuits, but also the case was rightly decided. Petitioner does not dispute that the SIP is a pension plan, that ERISA's anti-alienation provision applies to the SIP and its beneficiaries, that Liv Kennedy was decedent's sole beneficiary under the SIP, and that decedent never replaced Liv as his beneficiary under the SIP. (Pet. at 2-3). Petitioner acknowledges that the divorce decree is a domestic relations order within the meaning of § 1056(d)(3)(B)(ii) and that although the divorce court issued a QDRO, the QDRO did not apply to the SIP. (Pet. at 3-4).

Although ERISA exempts QDROs from the anti-alienation provision, ERISA provides that if a domestic relations order is determined *not* to be a QDRO the plan *must* pay the benefit in question to the person who would have been entitled to receive the benefit in question if there had been no order. *See* 29 U.S.C. § 1056(d)(3)(H)(iii). Petitioner has acknowledged that the divorce court's order was not a QDRO. Thus, the QDRO provisions did not merely prohibit the SIP from giving effect to the divorce order; they also *required* the SIP to distribute decedent's account balance to decedent's designated beneficiary.

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which anti-alienation provision does not apply); *Strong v. Omaha Constr. Ind. Pension Plan*, 701 N.W. 2d 320 (Nebr. 2005) largely ignoring the anti-alienation provision).

There are three alternative approaches that the parties could have taken to assure that the SIP death benefit would be paid to someone other than Liv Kennedy:

- The parties could have asked the divorce court to issue a QDRO directing the SIP to pay decedent's account balance to one or more alternate payees;
- At any time during the roughly seven-year period between the divorce and decedent's death, decedent could have designated someone else as his beneficiary under the SIP; or
- Before the date of the divorce, if decedent had been able to obtain his wife's consent, decedent could have designated someone else as his beneficiary under the SIP.

Liv Kennedy's status as decedent's beneficiary under the SIP following the divorce was thus not the result of a "gap" in the statute; it was due to the parties' failure to take any of the approaches that ERISA offered them. In the absence of a gap in the statute, there is no justification for formulating a common-law rule, as Petitioner proposes, and no need for the Court to grant the petition for a writ of certiorari.

B. In an effort to show that this case is worthy of review, Petitioner attempts at some length (Pet. 9-12) to construct a series of conflicts among the

circuits. Although conflicts do exist, that division of authority does not affect the narrow holding of the Fifth Circuit in this case.[8]

More specifically, the courts have developed two theories to deal with a claim of waiver of benefits by a designated beneficiary. One theory addresses whether ERISA authorizes courts to adopt common-law rules that give effect to a waiver of benefits if the waiver meets certain requirements, including specificity, voluntariness, and good faith. *See, e.g., Manning v. Hayes*, 212 F.3d 866, 874 (5th Cir. 2000); *Clift v. Clift*, 210 F.3d 268, 271 (5th Cir. 2000); *Fox Valley*, 897 F.2d at 281.

The other theory is usually called the "plan documents" approach, which requires *all* employee benefit plans to be administered in accordance with the terms of the plan and the forms on file with the administrator. Thus, no alteration of beneficiaries would be permitted except in accordance with terms of the plan and not by other documents such as private agreements between participants and beneficiaries. *See, e.g., McMillan v. Parrott*, 913 F.2d 310

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[8] In his amicus brief upon invitation from this Court in *McGowan*, the Solicitor General did not sufficiently focus on the difference between welfare and pension cases and their relation to the anti-alienation provision in concluding that there is a split of authority among the circuits.

(6th Cir. 1990); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993).[9]

In the case at bar, the Fifth Circuit did not need to resort to either of these theories because it based its decision exclusively on the anti-alienation provision. Since a QDRO was prepared and submitted to the state court in the divorce proceedings but did not cover the SIP, the court of appeals reasoned that the alienation or waiver of beneficiary rights was statutorily barred. Finding no gap in the statutory regime, there was no need to resort to either the waiver theory or the plan documents approach.

Indeed, the Fifth Circuit emphasized that prior Fifth Circuit decisions that adopted the other theories were simply inapposite because they involved welfare benefits to which the anti-alienation provision of ERISA does not apply. (Pet. App. 5-6) Thus, any case involving welfare benefits is not in conflict with the ruling below on pension benefits.[10]

The anti-alienation provision applies only to pension benefits and not to welfare benefits. Therefore,

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[9] In the event this Court grants certiorari DuPont would argue, in the alternative, that it also should prevail under this "plan documents" approach.

[10] Most of the cases to which the anti-alienation provision was not applicable involved insurance disputes, as noted by the Fifth Circuit. (Pet. App. 5-6). *See also*, *Krishna*, *supra*; *Metro. Life Ins. Co. v. Pettit*, 164 F.3d 857 (4th Cir. 1998); *Metro. Life Ins. Co. v. Pressley*, 82 F.3d 126 (6th Cir. 1996); *Metro. Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991).

any case involving welfare benefits is fully outside the scope of the anti-alienation and QDRO provisions that are the basis of the Fifth Circuit's decision in this case.

The difference of opinion among the circuits as to the correct analysis of a beneficiary's waiver of benefits may be necessary in a future case that presents the correct factual context for its resolution. However, the instant case is not an appropriate vehicle to resolve any such division of authority on common-law theories of waiver. In this case, the Fifth Circuit simply did not choose between these different theories but rather based its decision solely on the anti-alienation provision that applies only to pension plans.

II. THERE IS NO DIVISION OF AUTHORITY REGARDING THE STANDARD GOVERNING ATTORNEY'S FEE AWARDS IN ERISA CASES.

There is no circuit split regarding the standard governing the award of attorney's fees in ERISA cases. Petitioner's argument to the contrary (Pet. 36-37) relies upon overruled authority and is completely wrong.

In deciding whether to grant the Estate attorney's fees, both the district court (Pet. App. 23) and the court of appeals (Pet. App. 12) applied a five-factor test set out by the Fifth Circuit in *Iron Workers*

Local No. 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980).[11]

Petitioner argued in both the district court and the court of appeals that the five-factor test was the correct test. Now, for the first time, Petitioner challenges the use of the five-factor test, and claims that there is a division of authority on this point among the courts of appeals. Petitioner has waived that argument.

Petitioner argues that the courts of appeals view the standard governing the award of attorney's fees in ERISA cases in two distinct ways. (Pet. 35-36). Petitioner claims that some circuits utilize the five-factor test first developed in *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978) (same five-factor test later adopted by the Fifth Circuit in *Bowen*, *supra*). (Pet. 35-36), while other circuits utilize the standard applied in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1978. (Pet. 36). Under the Civil Rights Fees Act, attorney's fees are to be

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[11] The five factors are:

1) degree of culpability or bad faith;

2) ability to satisfy an award;

3) deterrence value;

4) whether plaintiff sought to benefit all parties to the ERISA plan or to resolve a significant legal question regarding ERISA;

4) relative merits of parties' positions.

(Pet. App. 23).

awarded to a prevailing party unless special circumstances would render the award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Petitioner urges the adoption of the standard used in civil rights cases to ERISA cases, stating that the civil rights standard is "more consistent with ERISA's purposes" than the five-factor test. (Pet. 37). In support of this argument, Petitioner relies on the Eighth Circuit's decision in *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980), and the Ninth Circuit's decision in *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984), categorizing these cases as the side which utilizes the civil rights standard. (Pet. 36-37).

However, Petitioner is grossly misguided. The Eighth Circuit overturned *Landro* in *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 972 (8th Cir. 2002) (en banc), and now currently applies the *Eaves* five-factor test. *See also, Starr v. Metro Sys., Inc.*, 461 F.3d 1036, 1041 (8th Cir. 2006) (recent case following *Martin* and applying five-factor test).[12]

In *Martin*, the Eighth Circuit stated that while, in *Landro*, it was the first circuit to apply the civil rights standard to an ERISA case, it now agreed, for many reasons, "with the overwhelming majority of circuits that have considered this issue and concluded

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[12] Petitioner also heavily relies on two student-written law review comments and an article written for a business publication by two lawyers, all of which pre-date *Martin*. (Pet. 36, 37).

that the presumption should not be employed in ERISA cases." *Martin*, 299 F.3d at 971-72. The Eighth Circuit found that the five-factor test best facilitated the exercise of the district court's discretion, and "overrule[d] *Landro's* holding to the contrary." *Id.* at 972. Consequently, Petitioner's argument rests largely on an overruled decision.

The Ninth Circuit has always applied the five-factor test, *see Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452-53 (9th Cir. 1980),[13] and did so even in *Smith*. In *Smith*, the Ninth Circuit also decided to incorporate the civil rights standard on top of the five-factor test, while noting that the five-factor test still applied. *Smith*, 746 F.2d at 589-90 (holding that the *Hummell* five-factor test applies, but should be taken in light of remedial purpose of ERISA); *see also McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1172 (9th Cir. 1999) (noting that the Ninth Circuit applies the five-factor test and also applies the special circumstances rule used in civil rights cases).

However, *Smith*, which was the genesis of the civil rights standard "overlay" on the five-factor test in the Ninth Circuit, relied exclusively on the subsequently overruled decision in *Landro* as authority for

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[13] *Hummell* was the first case in which the Ninth Circuit considered the award of attorney's fees in an ERISA case. The court determined that the Fifth and Tenth Circuits in *Bowen*, 624 F.2d 1255 and *Eaves*, 587 F.2d 453, respectively, were correct in using the five-factor test as a guideline for the district courts and consequently adopted that standard. *Hummell*, 634 F.2d at 450.

superimposing the civil rights standard on top of the five-factor test. *Smith*, 746 F.2d at 589. It is noteworthy that the Ninth Circuit has, on occasion, also applied the five-factor test without incorporating the civil rights standard. *See, e.g., Tingey v. Pixley-Richards West, Inc.*, 958 F.2d 908 (9th Cir. 1992).

Consequently, contrary to Petitioner's argument (Pet. 35-39), every court of appeals, including the Eighth and the Ninth Circuits, employs some version of the five-factor test.[14] Accordingly, there is no circuit split, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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[14] *See Sullivan v. Randolph*, 504 F.3d 665, 670 (7th Cir. 2007), and *Martin, supra* (collecting authorities).

SUPPLEMENTAL BRIEF

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No. 07-636

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In the Supreme Court of the United States

KARI ELLEN KENNEDY, PETITIONER,

v.

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

By order dated October 28, 2008, the Court directed the parties to file supplemental briefs addressing the following question: "whether 29 U.S.C. § 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar."

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E. I. du Pont de Nemours and Company is a publicly held corporation. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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INTRODUCTION AND SUMMARY OF ARGUMENT

ERISA requires that covered employee benefit plans must be administered in accordance with the terms of the documents governing the plan, including those governing a participant's beneficiary designation. *See* 29 U.S.C. §§ 1101(a), 1102(a)(1), 1102(b)(4), 1104(a)(1)(D); *see also* § 1101(a). Here, William designated Liv as his beneficiary under the Savings and Investment Plan and – although he could have done so by submitting a simple form during the seven years between the Kennedys' divorce and his death – he never revoked that designation. Thus, Liv was the designated beneficiary under the SIP at William's death. Furthermore, although the Plan's terms required it to pay benefits pursuant to a QDRO, it is undisputed that the Kennedys' divorce decree was a non-qualified order.

Accordingly, if the Plan had paid William's account balance to his estate pursuant to the purported waiver in the divorce decree, rather than to Liv as his designated beneficiary, it would have violated the terms of the Plan. Moreover, because the statute requires that benefits be paid to the designated beneficiary, there is no gap for courts to fill in by creating federal common law directing payment to anyone else. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989); U.S. Am Br. 28-29. The United States and AARP, American Benefits Council (joined by the ERISA Industry Committee and the National Association of Manufacturers), and Western Conference of Teamsters Pension Trust Fund support this conclusion.

ARGUMENT

BECAUSE ERISA REQUIRES THAT A PLAN BE ADMINISTERED AND BENEFITS DETERMINED IN ACCORDANCE WITH THE PLAN DOCUMENTS, THE PLAN WAS OBLIGATED TO PAY WILLIAM'S ACCOUNT BALANCE TO LIV AS HIS DESIGNATED BENEFICIARY.

I. ERISA PLANS MUST BE ADMINISTERED IN ACCORDANCE WITH THE PLAN DOCUMENTS.

A. ERISA Requires That Benefits Be Paid To Beneficiaries Determined Pursuant To The Plan Documents.

ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." § 1102(a)(1). The plan must "specify the basis on which [benefit] payments are made . . . from the plan" (§ 1102(b)(4)), and the administrator must make payments to the "'beneficiary' . . . designated by a participant, or by the terms of . . . [the] plan" (§ 1002(8)). Furthermore, the plan must hold its assets for the exclusive purpose of providing benefits to participants and beneficiaries (as well as defraying reasonable administrative expenses). § 1103(c). Finally, a plan administrator, acting as a fiduciary, must "discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]." § 1104(a)(1)(D). *See* George A. Norwood, *Who Is Entitled*

to Receive a Deceased Participant's ERISA Retirement Plan Benefits – an Ex-Spouse or Current Spouse?, 33 GONZ. L. REV. 61, 72-74 (1997/1998).

Accordingly, this Court has recognized that plans must distribute benefits in accordance with the governing plan documents. *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 147-148 (2001); *Boggs v. Boggs*, 520 U.S. 833, 845-846 (1997); *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). *See also Schmidt v. Sheet Metal Workers' Nat'l Pension Fund*, 128 F.3d 541, 546 (7th Cir. 1997), *cert. denied*, 523 U.S. 1073 (1998).

The "plan documents" requirement serves two principal purposes.

1. First, it protects the interests of participants and beneficiaries. It ensures "that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 514 U.S. at 83, quoting H.R. Rep. No. 93-1280, at 297 (1974). "[T]he payment of benefits . . . [is] a central matter of plan administration" (*Egelhoff*, 532 U.S. at 148) and the ERISA "scheme . . . is built around reliance on the face of plan documents" (*Curtiss-Wright*, 514 U.S. at 83). Thus, the "plan documents" requirement ensures that rightful beneficiaries are correctly determined and promptly paid. *See* 2 Daniel C. Knickerbocker, EMPLOYEE BENEFITS GUIDE § 24.15, at 24-51 to 24-53 (2008).

2. Second, the "plan documents" requirement "enables plan administrators . . . [to] manage the plan on a day-to-day level" in a practical and efficient manner.

Curtiss-Wright, 514 U.S. at 82. This is "[o]ne of the principal goals of ERISA" (*Egelhoff*, 532 U.S. at 148), and "[t]he most efficient way [for a plan] to meet [its] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

The legislative history reflects this congressional policy. Congress recognized that employee benefit plans are not mandatory but rather are optional at the election of the employer. *See* H.R. Rep. No. 93-533, at 1, 9 (1973). Concerned that the costs of administering employee benefit plans could deter the establishment and growth of such plans, Congress sought to "strike a balance between providing meaningful reform and keeping costs within reasonable limits." H.R. Rep. No. 93-807, at 15 (1974). Congress therefore "weighed carefully the additional costs to the employers and minimized these costs to the extent consistent with minimum standards for retirement benefits." H.R. Rep. No. 93-779, at 2 (1974). *See Beck v. Pace Int'l Union*, 127 S. Ct. 2310, 2314 (2007) (benefit plans are voluntary); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) (there is a "'public interest in encouraging the formation of employee benefit plans'") (citation omitted).

This Court has recognized "the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators." *Egelhoff*, 532 U.S. at 149-50 (citation omitted). *See also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1027 (2008) (Roberts, C.J., concurring). Congress thus had

"competing purposes": the "desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497. *See also Mertens*, 508 U.S. at 262-63.

The "plan documents" requirement enables administrators to "make payments simply by identifying the beneficiary specified in the plan documents." *Egelhoff*, 532 U.S. at 148. "Pension plans are high-volume operations" and "rely heavily on forms, such as designations of beneficiaries." *Blue v. UAL Corp.*, 160 F.3d 383, 386 (7th Cir. 1998). Furthermore, administrators typically are not lawyers, and the pension system could not effectively operate if advice of counsel routinely had to be sought to process claims. *See Boggs*, 520 U.S. at 853 ("Congress could not have intended that pension benefits from pension plans would be given to accountants and attorneys" to administer). *See also* Norwood, *supra*, at 79-80. Thus, the "plan documents" requirement enables administrators to pay benefits – efficiently, promptly, consistently, and correctly – in accordance with the documents establishing the plan.

In sum, Congress understood that efficiency and administrability are critical to the sound operation of the pension system. *See Egelhoff*, 532 U.S. at 149 n.3 (referring to ERISA's central "objective of efficient plan administration"). ERISA provides "unyielding rules" rather than "flexible standards" to be applied to the particular facts and circumstances of each individual case. *Fox Valley & Vicinity Constr. Workers Pension*

Fund v. Brown, 897 F.2d 275, 283-84 (7th Cir.) (en banc) (Easterbrook, J., dissenting), *cert. denied*, 498 U.S. 820 (1990). "Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules." *Id* at 283.[1]

B. Payment Of Pension Benefits In Accordance With A QDRO But Not A Non-Qualified Order Is Required By The "Plan Documents" Provisions.

Contrary to petitioner's contention (*see* Pet. Reply Br. 28), the payment of pension benefits pursuant to a QDRO, but not pursuant to a non-qualified domestic relations order, is required by ERISA's "plan documents" provisions. Indeed, ERISA expressly provides that "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order" (§ 1056(d)(3)(A)), and the SIP so provides. *See* SIP, p. 48 (D.I. 33, Ex. 15, D0088). Because plans must provide for payment in accordance with QDROs, administrators are complying with rather than departing from the plan when benefits are paid pursuant to a QDRO. *See Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1121 (10th Cir.), *cert. denied*, 502 U.S. 1020 (1991).

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[1] Furthermore, as this Court has explained, the costs of expense, delay, and uncertainty are "ultimately borne by the beneficiaries." *Egelhoff*, 532 U.S. at 150.

These QDRO provisions promote the same congressional policy of efficiency, simplicity, and consistency as the "plan documents" requirement. The language, history, and purposes of the QDRO provisions are discussed in respondents' opening brief. *See* Resp. Br. 29-32, 51-52. In basing the QDRO provisions on objective criteria that are easily applied by plan administrators, Congress sought to minimize the burden on plans and eliminate uncertainty by requiring that administrators be furnished, in the order itself, with the statutorily enumerated information necessary to determine whether the order is "qualified." *See* Resp. Br. 30-31; *Hamilton v. Washington State Plumbing & Pipefitting Indus. Pension Plan*, 433 F.3d 1091, 1096-97 (9th Cir.), *cert. denied*, 127 S. Ct. 86 (2006); *Carland*, 935 F.2d at 1122.[2]

Furthermore, ERISA contemplates that any order the parties intend to be a QDRO be submitted to the plan administrator to determine whether it is "qualified." *See* § 1056(d)(3)(G)(i)(II); *Hamilton*, 433 F.3d at 1097 & n.7; *Dorn v. Int'l Bhd. of Elec. Workers*, 211 F.3d 938, 942, 943-44 (5th Cir. 2000); *Fox Valley*, 897 F.2d at 783 (Easterbrook, J., dissenting); U.S. Am. Br. 26. Like the "plan documents" requirement, the QDRO provisions

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[2] Petitioner's reliance (Pet. Reply Br. 29) on cases treating orders as qualified if they substantially comply with ERISA is misplaced; here, the divorce decree was never intended to be a QDRO and did not come close to meeting the statutory requirements.

ensure that the plan "is on notice of its exact obligations." *Hamilton*, 433 F.3d at 1097.[3]

II. THE DECISIONS THAT HAVE RECOGNIZED COMMON-LAW WAIVERS CONTRARY TO PLAN DOCUMENTS ARE INCORRECT.

The Sixth and Second Circuits, and the Michigan Supreme Court, have correctly held that beneficiaries must be determined pursuant to ERISA's "plan documents" requirement rather than the theory of waiver under federal common law. *See Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415, 420-21 (6th Cir. 1997); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-16 (2d Cir. 1993); *Sweebe v. Sweebe*, 712 N.W.2d 708, 711-14 (Mich. 2006). *See also McGowan*, 423 F.3d at 244-48 (opinion of Van Antwerpen, J.); *Estate of Altobelli v. International Bus. Machines Corp.*, 77 F.3d 78, 82 (4th Cir. 1996) (Wilkinson, C.J., dissenting); *Fox Valley*, 897 F.2d at 282-83 (Easterbrook, J., dissenting), 284 (Ripple, J., dissenting); *Strong v. Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 331 (Neb. 2005) (Connolly, J., dissenting); *Keen v. Weaver*, 121 S.W.3d 721, 728 (Tex.) (Hecht, J., dissenting), *cert. denied*, 540 U.S. 1047 (2003); Norwood, *supra*, at 72-102.

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[3] As a practical matter, a QDRO submitted to and approved by the plan is a plan document. *See McGowan v. NJR Serv. Corp.*, 423 F.3d 241, 246 (3d Cir. 2005) (opinion of Van Antwerpen, J.), *cert. denied*, 127 S. Ct. 1118 (2007); *Fox Valley*, 897 F.2d at 283 (Easterbrook, J., dissenting); *Silber v. Silber*, 786 N.E.2d 1263, 1267 (N.Y.), *cert. denied*, 540 U.S. 817 (2003); U.S. Am. Br. 25. But regardless of whether a QDRO is a plan document, payment of benefits in accordance with a QDRO is mandated by the plan documents and thus complies with the "plan documents" requirement.

Admittedly, a majority of courts have held that a plan must give effect to a waiver of benefits in a non-qualified divorce decree under federal common law rather than to the participant's beneficiary designation made in accordance with the plan documents. *See* Pet. Br. 31-32 (collecting cases). These decisions, however, do not withstand scrutiny.

> [N]ot one of the courts in the majority has explained why the statutory analysis used by these courts adopting the plan-documents rule is flawed. . . . Because the waiver rule is based, at best, on throwaway, conclusory statements rather than a careful analysis of statutory language, . . . the fact that a majority of cases have adopted it is entitled to little weight.

Strong, 701 N.W.2d at 331 (Connolly, J., dissenting).

Courts holding that plans must give effect to a purported waiver that is contrary to the terms of the plan documents have reasoned that (1) ERISA's QDRO provisions already require administrators to go beyond plan documents in determining benefits, and (2) requiring administrators to recognize non-qualified divorce decrees imposes no greater burden than the QDRO provisions already impose. Both parts of this analysis are badly mistaken.

First, as explained above, payment of benefits under a QDRO is consistent with the "plan documents" requirement. *See* pages 6-8, *supra*. When benefits are paid pursuant to a QDRO, the administrator is following, not violating or going beyond, the plan's terms.

These courts also are wrong in concluding that non-qualified orders are no more burdensome than qualified orders for plan administrators to follow. It is vastly easier to interpret and implement orders that are submitted to the administrator for review under the plan's procedures to determine whether they satisfy ERISA's objective QDRO requirements than it is to handle orders that are not subject to a uniform legal standard, vary widely in content and form, and might not be submitted until after benefits have been paid to the designated beneficiary. Indeed, as explained above, a principal objective of the QDRO provisions is to *minimize* the burdens on plans. *See* pages 7-8, *supra*; *McGowan*, 423 F.3d at 247; U.S. Am. Br. 28. Furthermore, Congress itself, in enacting the QDRO provisions, recognized the enormous differences between qualified and non-qualified orders and purposely required plans to give effect only to QDROs precisely to avoid the immeasurably greater burdens that non-qualified orders would impose on plans. *See* page 7, *supra*; Resp. Br. 30-32; *Altobelli*, 77 F.3d at 83 (Wilkinson, C.J., dissenting) ("Congress was concerned with the very problems that face us here when it defined the requirements to establish a QDRO, and it took pains to ensure that enforcement of QDROs would not produce inefficiency and uncertainty").

Moreover, the common-law approach urged by petitioner is highly fact intensive and subjective and thus unworkable in practice. Unlike the simple procedure Congress contemplated, it would require a time-consuming, costly, and speculative process of interpreting non-qualified decrees. Congress never intended to require plan administrators to resolve

factual questions such as the voluntariness and good faith of the divorcing parties' agreement to a purported waiver, the particular circumstances of their divorce, and the ex-spouses' post-divorce relationship. Accordingly, petitioner's common-law approach would not lead to readily determinable and consistent results. The existing case law demonstrates these problems.

First, as the United States discusses, the common-law approach would require plan administrators "to decide among the 'myriad of tests' courts have developed to determine whether language in a domestic relations order is sufficient to constitute a valid waiver." U.S. Am. Br. 27 (citation omitted). For example, in the Fifth Circuit, the standard is whether "the waiver is explicit, voluntary, and made in good faith." *Manning v. Hayes*, 212 F.3d 866, 874 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). On its face, that standard requires intensely factual and subjective inquiries. This case well illustrates the difficulty. Here, the divorce decree uses the term "divested"; nowhere does the word "waived" appear even though waiver is the linchpin of petitioner's argument. It would be extraordinarily burdensome and ultimately impossible for a plan administrator reliably to determine whether the divorcing parties' choice of this language has any significance.

Similarly, as the government explains, the common-law approach leads to unpredictable and "inconsistent interpretations" (U.S. Am. Br. 28) with "substantially similar language being treated differently" (*id.* at 27 n.9). In this case, for instance, the Kennedys' divorce decree does not specifically refer to Liv's right to SIP death benefits and did not preclude William from

maintaining Liv as his beneficiary after the divorce. *See also* page 17, *infra*. Although the district court concluded that Liv nonetheless waived those benefits (*see* Pet. App. 31-52), the Eighth Circuit has held that indistinguishable language in a divorce decree did not waive death benefits under federal common law. *See Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693-94 (8th Cir. 1989). There, the decree provided that the ex-husband "shall have as his own, free and clear of any interest of [his ex-wife], the interest in the profit-sharing plan." The court ruled that the decree did not waive the ex-wife's right to death benefits because it did not "specifically refer to and modify the beneficiary interest." Such inconsistencies are inevitable under petitioner's common-law approach.

The fact-intensive and unpredictable nature of the common-law approach is further illustrated by the Eighth Circuit's decisions in *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir.), *cert. denied*, 516 U.S. 868 (1995), and *National Auto. Dealers and Assocs. Retirement Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996). Although the language in the two decrees was substantially similar (*see* 89 F.3d at 501), the court came to opposite results based on the facts of each case.

In *Mohamed*, the ex-husband was seriously ill, and the ex-wife "could not get away fast enough, and she never looked back . . . [and] abandoned him to his illness." 53 F.3d at 916. Furthermore, "[o]nce the divorce was final all ties between [the ex-spouses] were severed." *Id.* Based on "the facts surrounding the Kerrs' divorce" and their post-divorce relationship (*id.*), the Eighth Circuit reached the "fact-driven determination"

(*id.* at 915) that the divorce decree waived death benefits under federal common law.

By contrast, in *National Auto. Dealers*, the Eighth Circuit concluded that similar language did not constitute a waiver. There, the ex-spouses "'maintained an amicable relationship'" and the ex-husband "provided more support to [the ex-wife] . . . than he was legally obligated to provide." 89 F.3d at 501. Based on those facts, the court distinguished *Mohamed* as involving "a vastly different situation" *Id.*

These divergent results, and the underlying fact-intensive and subjective common-law inquiries, are irreconcilable with ERISA's fundamental design to have a simple, efficient, and administrable benefits system. In enacting the "plan documents" requirement, Congress intended that benefit decisions would be made pursuant to a bright-line and objective standard that could be easily and consistently applied by plan administrators.

Accordingly, ERISA forecloses the analysis of those courts that have followed federal common law rather than the plan documents. ERISA's "clear statutory command, together with the plan provisions, answer the question; the documents control, and those name [the ex-wife]." *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990). *See also Altobelli*, 77 F.3d at 82 (Wilkinson, C.J., dissenting). As then-Chief Judge Wilkinson observed, "[w]hat seem like small equitable steps in a particular case may lead to large administrative headaches in the aggregate." *Id.* at 84.

III. UNDER ERISA'S "PLAN DOCUMENTS" REQUIREMENT, THE PLAN COULD NOT GIVE EFFECT TO LIV'S PURPORTED WAIVER IN THE DIVORCE DECREE AND HAD TO PAY WILLIAM'S ACCOUNT BALANCE TO LIV AS WILLIAM'S DESIGNATED BENEFICIARY.

A. The Plan Documents Made Liv The Designated Beneficiary And Required The Plan To Pay Her.

Under the terms of the SIP, the Plan could not follow Liv's purported waiver in the non-qualified divorce decree. Instead, it was required to pay William's account balance to Liv as William's designated beneficiary.

The SIP documents are clear and not disputed by petitioner. The SIP entitled each participant to "designate any beneficiary or beneficiaries he chooses to receive all or part of his interests . . . in case of his death." J.A. 48. The SIP also allowed him to "replace or revoke such designation." *Id.* Any designation, replacement, or revocation had to be made in the manner prescribed by the Plan (*id.* at 52), which supplied forms for such purposes (*id.* at 34, 56-57). Furthermore, the Plan stated that "distribution shall be made to . . . the executor . . . of the decedent's estate" only *"[i]f* no surviving spouse exists and *no beneficiary designation is in effect."* *Id.* at 48 (emphasis added).[4]

---

[4] Petitioner suggests that William's designation of Liv was not "in effect" because of the purported waiver in the divorce decree. *See* Transcript of Oral Argument 10-11 (Oct. 7, 2008) ("Tr."). That is a circular word game. The "plan documents" requirement serves precisely to avoid the burdens and uncertainties that would occur if administrators had to look beyond plan documents to determine whether non-plan documents indicate a different beneficiary.

Moreover, the SIP provided a mechanism for Liv to disclaim her right to benefits by filing a qualified disclaimer under 26 U.S.C. § 2518. *See* J.A. 50. However, as previously explained, and as petitioner does not contest, the purported waiver in the Kennedys' divorce decree is not a qualified disclaimer because it involved consideration. *See* Resp. Br. 21-23.

The Summary Plan Description also set forth the rules for paying benefits upon the participant's death. The SPD stated that death benefits would be paid to the designated beneficiary: "If you die before receiving your SIP account balances, your beneficiary(ies) will receive the balance in your accounts." J.A. 43. *See also* SPD, p. 22 (D.I. 40, Ex. C, D0027) ("[g]enerally, plan benefits may be paid only . . . to your beneficiaries or survivors"). The SPD further explained that "an exception to this may be made as a result of a qualified domestic relations order." *Id.* It therefore was clear that death benefits would be paid to the designated beneficiary unless a QDRO provided otherwise.

Thus, following the divorce, William was the "master of his own ERISA plan." *McMillan*, 913 F.2d at 312. And, although William lived for seven years after the divorce, he never changed his SIP beneficiary designation. He did, however, make a post-divorce change in his beneficiary designation under the separate Pension and Retirement Plan and hence was aware of his right to make such a change and the simple process for doing so. *See* Resp. Br. 9; page 16, *infra*.

Accordingly, the applicable plan documents obligated the SIP to pay William's account balance to Liv as his designated beneficiary. *See McMillan*, 913 F.2d at 312 ("it was [the participant's] designation which controls, not [his ex-wife's] intent").

B. Petitioner's Remaining Arguments Are Without Merit.

1. Petitioner asserts that the form William submitted to designate Kari as his beneficiary for the Pension and Retirement Plan also made her his beneficiary under the SIP. *See* Pet. Reply Br. 16-17; Tr. 7-8. In both its title and its body, however, this form plainly stated that it applied to "the Pension and Retirement Plan" (J.A. 62) – not the SIP. What is more, petitioner *stipulated* in the district court that William "never executed any forms or documents to remove or replace Liv Kennedy as his sole beneficiary under . . . the SIP." J.A. 28. *See also* Pet. App. 3 (William "never executed any documents replacing or removing Liv Kennedy as the SIP beneficiary"). Moreover, under this argument, Kari would be the beneficiary and thus was required to file suit in her individual capacity rather than as executrix of William's estate. Petitioner's eleventh-hour about-face is both procedurally and substantively unavailing.

2. Petitioner also argues that William and Liv intended in their 1994 divorce that Liv would not receive the death benefits under the Plan. *See* Tr. 8. This is both irrelevant and unsubstantiated.

It is irrelevant because the identity of the beneficiary cannot turn on the intentions of the divorcing parties. *See* Resp. Br. 38-39. As explained above, a fact-intensive inquiry into the divorcing parties' state of mind would be incompatible with the simple, efficient, and easily administrable process Congress intended. *See* pages 3-6, *supra*.

It is unsubstantiated because it cannot now be known what William and Liv intended in their divorce. The divorce decree itself does not answer that question. It left the decision to William, but nothing prevented him from maintaining Liv as his beneficiary following the divorce. In fact, there are a number of cases where that occurred. *See* Resp. Br. 38 & n.11.

All that can be said with any certainty is that William's thoughts subsequent to the divorce cannot now be known and that there are several possible explanations for not changing the designated SIP beneficiary, including the possibility that he wanted Liv to receive the benefits upon his death. That Liv had no right to them following the divorce did not in any way prohibit William from maintaining her as the beneficiary or reveal anything about his post-divorce intentions. Beneficiaries would not be able to determine their rights, and plans would not be administrable, if benefits turned on such a speculative will-o'-the wisp.

3. Finally, petitioner asserts that the beneficiary designation form is not a plan document. *See* Pet. Reply Br. 23; Tr. 20. Once again, that is irrelevant.

It is clear – and petitioner has never argued otherwise – that the SIP is a plan document and provides that benefits be paid to the beneficiary properly designated in accordance with the terms of the Plan. Thus, whether or not the form itself is a plan document, the Plan requires that payment be made to the designated beneficiary, and payment to anyone else would violate the "plan documents" requirement. *See* Tr. 26.[5]

Petitioner further argues that the Summary Plan Description (mistakenly referred to as the SIP) defined the plan documents and did not include beneficiary designation forms. *See* Pet. Reply Br. 25; Tr. 56. Nothing in the SPD, however, changed the plan requirement that benefits be paid to the designated beneficiary. Moreover, the SPD did precisely what it was supposed to do: it fairly described itself as a "reasonably thorough" and "non-technical" explanation, and it referred participants to the official plan texts of the SIP and the trustee agreement as "the governing documents in the event questions arise." SPD, p. 24 (D.I. 40, Ex. C., D0029).[6]

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[5] Contrary to petitioner's argument (*see* Pet. Reply Br. 23), just as a QDRO is effectively a plan document, the beneficiary designation form also should be considered a plan document for purposes of the payment of benefits. *See* page 8 note 3, *supra*. The plan makes this the controlling document for benefit payments, and it is submitted to and maintained by the plan for that purpose. *See* Norwood, *supra*, at 74-77.

[6] Petitioner also asserts (Pet. Reply Br. 24-25; Tr. 21) that a ruling for respondents would require that beneficiary designation forms be disclosed to all participants under § 1024(b)(4). That issue has not been adequately briefed and is outside the scope of this case. For present purposes, it is sufficient to note that courts have recognized limits under § 1024(b)(4) (*see, e.g., Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139

(Cont'd)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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(Cont'd)

(2d Cir. 1997)) and that petitioner's construction of the statute to require that each participant's designation form be disclosed to all participants is nonsensical.

SUPPLEMENTAL BRIEF

No. 07-636

Supreme Court, U.S.
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In The Supreme Court of the United States

KARI ELLEN KENNEDY, INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM PATRICK KENNEDY, DECEASED,

Petitioner,

versus

PLAN ADMINISTRATOR FOR DUPONT SAVINGS AND INVESTMENT PLAN; E.I. DUPONT DE NEMOURS & COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL BRIEFING CONCERNING 29 U.S.C. § 1104(a)(1)(D)

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QUESTION PRESENTED FOR REVIEW

Whether 29 U.S.C. § 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar?

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SUMMARY OF ARGUMENT

The "documents and instruments governing" a plan under ERISA's "prudent man" standard of care statute, 29 U.S.C. § 1104(a)(1)(D), do not include beneficiary designations. That statute did not require DuPont's Plan Administrator to pay Liv Kennedy benefits she knowingly, voluntarily, and expressly waived. The clear, unambiguous waiver in Liv's divorce decree was in the Plan Administrator's file *before* payout. The federal common law precedent of most courts, and the collective wisdom of 45 legislatures, recognizes that divorced spouses do not knowingly enrich ex-spouses to the detriment of children. So should this Court.

The "Plan Documents" defense rewrites ERISA. A designation is not a "document or instrument governing" DuPont's 401k Plan under a plain-meaning interpretation of § 1104(a)(1)(D). Ever-changing beneficiary designations are not among the "documents" and "instruments" governing a plan in 29 U.S.C. §§ 1022-1026.

Neither DuPont's designations nor its Plan Summary gave notice of a "Plan Documents" Rule that precludes challenges based on waiver and the traditional rule that wrongdoers must not profit by wrongdoing. DuPont's rule would reward murderous children and spouses who slay plan-participant parents and spouses; incentivize fraud during negotiations; and undermine regulations governing gifts, disclaimers, and taxes.

Although DuPont argues that only lawyers can determine whether a waiver is voluntary, the contrary is true. Millions of times every year, hundreds of thousands of non-lawyer police officers, deputies, constables, and justices of the peace decide whether a suspect's waiver of *Miranda* rights is knowing and voluntary. Waivers of jury trials, appeals, and liability as well as medical consent waivers, are part of everyday life.

Judicial extension of a "Plan Documents" Rule to include designations would conflict with specific, later-enacted ERISA provisions controlling the form and payment of benefits. Such a deviation from traditional statutory interpretation would decrease respect for the legitimacy of all law. It would deny courts their ERISA-mandated role of creating a federal common law of benefits where judges act on the basis of all available evidence. It would eviscerate a uniform concept of voluntary waiver based on RESTATEMENT (SECOND) OF CONTRACTS § 84 comment b. It would privatize law, replacing federal statutory uniformity with a confusing collection of conflicting "plan document" designations clouded by plan administrator conflicts of interest. Such an approach would multiply litigation and render a uniform approach to ERISA impossible.

ARGUMENT

I. The SIP beneficiary designation Liv Kennedy waived was not a "document or instrument governing" DuPont's Plan under the plain meaning of 29 U.S.C. § 1104(a)(1)(D).

A. While ERISA's "prudent man" standard of care imposes traditional, common law trust fiduciary duties on administrators, it does not mandate that they ignore express, voluntary waivers of benefits.

DuPont asserts that its "Plan Documents" interpretation of 29 U.S.C. § 1104(a)(1)(D) mandates that courts ignore a divorcing spouse's voluntary, written, attorney-negotiated, court-approved waiver of pension benefits in a property settlement agreement if that waiver conflicts with a beneficiary designation "plan document." DuPont is wrong: beneficiary designations are not "plan documents" that "govern" plans.

1. 29 U.S.C. § 1104(a)(1)(D) is a fiduciary-duty law, not a beneficiary determination law.

A plain-meaning interpretation governs § 1104(a)(1)(D), just as it governs § 1056(d)(3)'s QDRO statute. The statute reads as follows:

§ 1104 Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 USC §§ 1103(c), 1103(d), 1342, and 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries:

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Are beneficiary designations "documents and instruments governing the plan"? They are not.

Provisions governing payment of benefits appear in Subchapter 1, Subtitle B, Part 2, "Participation and Vesting." Section 1104(a)(1)(D) is in Subtitle B, Part 4's laws about "Fiduciary Responsibility." The "fiduciary duties" and "prudent man standard of care" headings in Section 1104(a)(1)(D) are signboards that "aid in resolving an ambiguity in the legislation's text." *INS v. Nat'l Center for Immigrants' Rights,* 502 U.S. 183, 189 (1991).

Section 1104(a)(1)'s "prudent man standard" arose under the common law of trusts. It addresses financial/investment matters. A provision immediately

preceding Section 1104(a) -- 29 U.S.C. § 1104(a)(1)(B) – dictates that a fiduciary shall discharge ERISA responsibilities "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Subsections address IRAs, rollovers, and plan terminations – financial, not beneficiary, issues. The terms "beneficiary," "designation," and "waiver" are not found in Section 1104, however.

DuPont's "Plan Documents" Rule conflicts with provisions that expressly authorize payments to persons not on designations. A plan administrator presented with a QDRO and a demand to transfer benefits to a child or ex-spouse must pay the alternate payee designated in the QDRO rather than the beneficiary designated. And a designated beneficiary spouse with a joint and survivor annuity may waive entitlement to those benefits under 29 U.S.C. § 1055(c)(1)(A).

Pre-ERISA courts did not bar waivers or disclaimers of spendthrift trust benefits, but, instead, upheld those waivers. *See Brown v. Routzahn,* 63 F.2d 914, 917 (6th Cir.), *cert. denied,* 290 U.S. 641 (1933) (recipient's renunciation of inheritance did not constitute a transfer). Under federal law prior to ERISA, a beneficiary under a will or trust was under no obligation to accept a legacy or gift. *U.S. v. McCrackin,* 189 F.Supp. 632, 634-37 (S.D. Ohio 1960) (holding that a son's disclaimer/waiver was valid); Lawrence

Newman and Albert Kalter, *The Need for Disclaimer Legislation – An Analysis of the Background and Current Law,* 28 TAX LAWYER 571 (1975); and the Kennedy Merits Brief at 19-21. Extension of the "Plan Documents" Rule to include designations elevates administrators above participants and beneficiaries in violation of 29 U.S.C. § 1104(a)(1)(A)(i).

Congress did not end federal common law waiver by codifying, in 29 U.S.C. § 1104(a)(1), the "prudent man standard of care" from the law of trusts. "[I]t would be surprising, indeed," if Congress had affected a "radical" change in the law "*sub silentio*" via "technical and conforming amendments." *Director of Revenue of Mo. v. CoBank, ACB,* 531 U.S. 316, 323 (2001). "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection,* 474 U.S. 494, 501 (1986); *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 266-67 (1979).

When Congress wants to bar waivers, it knows how to do so – expressly rather than impliedly through something as gossamer-thin as the "Plan Documents" doctrine. The Securities Act of 1933 and the Securities Exchange Act of 1934 expressly declare waivers to be void, 15 U.S.C. § 77n and § 78bb. But ERISA contains no similar bar. Without an express statutory ban, this Court has no reason to rule that Congress barred waivers *sub silentio.* "Congress...does not alter the fundamental details of a

regulatory scheme in vague terms or ancillary provisions – it does not...hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances....").

Other ERISA provisions, 29 U.S.C. §§ 1054-1056, govern accrual and payment of pension benefits. The Qualified Joint and Survivor Annuity ("QJSA") statute, 29 U.S.C. § 1055, provides a spouse with an annuity benefit. The statute controlling payment of benefits is not 29 U.S.C. § 1104(a)(1)(D) but § 1056, which addresses disputes about Domestic Relations Orders ("DROs") that "provide" (pay, supply, or transfer) benefits for "child support, alimony payments, or marital property to a spouse, former spouse, child, or other dependent of a participant."[1] Neither 29 U.S.C.

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[1] Congress was *precise* in crafting benefit payments language. *See*, 29 U.S.C. §§ 1056(d)(1) (barring alienation of benefits "provided" to others, *i.e.*, supplied or paid); 1056(d)(3)(B)(ii) (defining a DRO as "any judgment, decree, or order (including approval of a property settlement agreement) which (I) relates to the *provision* of child support, alimony payments, or marital property rights...") (emphasis supplied)); 1056(d)(3)(G) (payments to alternate payees); 1056(d)(3)(H) (segregation into separate accounts of money payable to an alternate payee "[d]uring any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise)..."); 1056(d)(3)(K) (defining a DRO

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§ 1056(d) nor § 1104(a)(1)(D) applies here because Liv's waiver did not result in participant William's "provision," payment, or transfer of SIP benefits to her. The specific, later-enacted terms of a statute override general, earlier-enacted terms. *U.S. v. Estate of Romani*, 523 U.S. 517, 532 (1998); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957). ERISA's accrual, QJSA, and QDRO laws, 29 U.S.C. §§ 1054-1056, specifically govern the accrual and payment of benefits – not 29 U.S.C. § 1104(a)(1)(D).

2. Beneficiary designations do not "govern" a plan.

In *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3d Cir. 2005), *cert. denied*, 547 U.S. 1017 (2006), Judge Fuentes cautioned that,

> Judge Van Antwerpen's opinion reads this provision as allowing all documents filed with the Plan to govern its administration, including forms filed to designate beneficiaries. However...I note in passing that the governing documents could reasonably be limited to those that set forth the terms of the plan.

"alternate payee" as a person "having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.").

Id. at 258 n.17 (dissent), referencing *McElroy v. SmithKline Beecham Health & Welfare Benefits Trust Plan for U.S. Employees,* 340 F.3d 139, 143-44 (3d Cir. 2003).

The critical terms in Section 1104(a)(1)(D) are "documents and instruments" and "governing." A leading dictionary defines "governing document" under "Document," subset "Governing Document." *See* Bryan A. Garner (ed.), *Black's Law Dictionary* (8th ed. 2004) at 520 and 715. *Black's* defines a "governing document" as "[a] document that defines or organizes an organization, or grants or establishes its authority and governance." *Id.* at 520. "An organization's governing documents may include a charter, articles of incorporation or association, a constitution, bylaws, and rules..." That comports with 29 U.S.C. § 1102, which defines "instrument" by stating that every plan "shall be established and maintained pursuant to a written instrument."

An ERISA "plan" instrument governs a plan by "establish[ing] and maintain[ing]" it. Designations do neither. The prudent-man standard, 29 U.S.C. § 1104(a), of which Subsection (1)(D) is a part, imposes fiduciary duties on financial and investment decision-makers. It does not direct or distribute pension benefits. Other provisions – 29 U.S.C. §§ 1054-1056 – specifically do so. ERISA's "definitions" section, 29 U.S.C. § 1002, defines terms but not "plan instruments." To determine what documents and instruments govern a plan, this Court turns to 29 U.S.C. §§ 1022-1025 under Subtitle B, "Regulatory

Provisions," where the same language appears. *See Ratzlaf v. United States,* 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

The most relevant statute, § 1024, governs the "Filing and Furnishing of Information." Subsection (a)(6) requires public filing of "any *documents* relating to the employee benefit plan, including but not limited to, the latest summary plan description...and the bargaining agreement, trust agreement, contract, *or other instrument under which the plan is established or operated.*" (Emphasis supplied). Documents and instruments "governing" a plan are those "under which the plan is established or operated," 29 U.S.C. § 1024(b)(4):

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description[,] and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or *other instruments under which the plan is established or operated....*

(Emphasis supplied). Section 1024's enumeration of governing documents and instruments does *not* include designations. In *Hughes Salaried Retirees v. Administrator of Hughes,* 72 F.3d 686, 688 (9th Cir. 1995) (*en banc*), *cert. denied,* 517 U.S. 1189 (1996), the court held that a list of plan participants was not an instrument "under which the plan is established or operated":

> The relevant documents are those that provide individual participants with information about the plan and benefits...Unlike the documents specifically listed in § 1024(b)(4)...participants' names and addresses provide no information about the plan or benefits. As the district court said it so aptly, it would strain the meaning of "other instruments under which the plan is established or operated" to interpret it to include participant names and addresses.

Hughes, 72 F.3d at 690, *citing Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73 (1995). If a list of participant names is not a "document or instrument governing" a plan, neither is a designation.

Even DuPont did not view its beneficiary designations as "Plan Documents." DuPont's Plan Summary reads:

> **PLAN DOCUMENTS**
>
> This summary plan description is intended to provide you with a reasonably thorough explanation of the Savings and Investment Plan....*The official plan texts are the E.I. DuPont de Nemours and Company Savings and Investment Plan and the Trustee Agreement between the Company and the plan trustee.* These texts are the *governing documents* in the event questions arise.

Dkt. 40-1, p. 61 (italics supplied). DuPont stated that the only "governing documents" – a variation on the terms in §§ 1104(a)(1)(D) and 1024(b)(4) – were its

plan and trustee agreement, but not beneficiary designations. And none of DuPont's designations state that they are plan documents. J.A. 34 (TRASOP); 56-57 (Thrift Plan); 62 (Survivor Benefits).

If this Court holds that designations are "plan documents," administrators will then have to disclose them to any participant or beneficiary who can afford a postage stamp. *See* 29 U.S.C. § 1024(b)(4) (an administrator "shall, upon written request of any participant or beneficiary, furnish a copy of...*instruments under which the plan is established or operated.*") (emphasis supplied); 29 U.S.C. § 1025(a) (an administrator shall furnish to "any beneficiary who so requests in writing" *inter alia,* "the total benefits accrued..."). Disclosing designations to everyone in the line of succession would subject participants and beneficiaries to harassment, emotional abuse and manipulation, and telemarketing. *Hughes,* 72 F.3d at 694-95. A participant's child who received no response to such a benefits letter will demand to become a beneficiary. The potential for family discord is obvious.

3. Neither ERISA nor DuPont's Plan Summary warns participants and beneficiaries that beneficiary designations are un-waivable.

Because ERISA does not define a designation as a "plan document," a plan must give participants and beneficiaries notice that the plan precludes waiver,

ambiguity, incapacity, and other challenges to designations. Under 29 U.S.C. § 1022(b), ERISA mandates disclosure of "the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits..." DuPont did not give notice to William Kennedy that a beneficiary designation, once made, could never be waived or challenged. *See* J.A. 43-45, 48-50, 56-57, 62-63.

Review of an ERISA payment does not end with a plan's governing documents. "We agree with the Court of Appeals that trust documents cannot excuse trustees from their duties under ERISA, and that trust documents must generally be construed in light of ERISA's policies, *see* 29 U.S.C. § 1104(a)(1)(D)..." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport,* 472 U.S. 559, 568 (1985). Under the common law of trusts, "[a] trustee is...expected to 'investigate the identity of the beneficiary when the trust documents do not clearly fix such party.'" *Id.* at 572 (citing George R. Bogert & George T. Bogert, *Law of Trusts and Trustees* § 583, p. 348-49, n.40 (2d rev. ed. 1980)). DuPont's proposed rule would excuse plan-administrators who choose to ignore waivers and elevate their convenience of administrators above their fiduciary duty to examine claims submitted on behalf of beneficiaries.

If a plan's drafters fail to expressly warn participants and beneficiaries that the plan will never

respect a waiver or disclaimer of pension benefits, no plan administrator can later deprive a participant's executor or heirs of the inheritance they have every right to expect. Here, DuPont failed to give the notice necessary to enforce even its "Plan Documents" Rule.

B. The most well-reasoned decisions reject DuPont's notion that 29 U.S.C. § 1104(a)(1)(D) precludes courts from recognizing waivers.

"The plan-documents rule...is the minority rule. A majority of courts have concluded that 29 U.S.C. § 1104(a)(1)(D) does not govern the issue..." *Strong v. Omaha Constr. Indus. Pension Plan,* 270 Neb. 1, 8, 701 N.W.2d 320, 327 (2005). In *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), the Fifth Circuit rejected the notion that § 1104(a)(1)(D) had created a "Plan Documents" Rule precluding challenges under the judge-made, federal common law of ERISA:

> Section 1104 defines the fiduciary duties owed by the plan administrator to plan participants and beneficiaries. That section does not either expressly or implicitly purport to establish any methodology for determining the beneficiary of an ERISA plan or for resolving competing claims to insurance proceeds. Thus, considered in isolation, § 1104(d) is a very thin reed upon which to find complete conflict preemption with respect to competing claims to life insurance proceeds....[T]he Sixth Circuit's bright line rule that a beneficiary designation cannot be

> challenged would supplant what is a fairly uniform set of state laws providing that a named beneficiary who kills a plan participant in order to obtain the plan benefits is not entitled to recover those proceeds...ERISA is broad enough in its preemptive scope....There is no additional need to breathe imaginary preemptive effect with respect to competing claims for life insurance benefits into general provisions addressing another topic altogether.

Manning, 212 F.3d at 872.

DuPont's "Plan Documents" Rule would run roughshod over the collective wisdom of countless courts and at least 45 legislatures that have recognized that the vast majority of people do not choose to enrich ex-spouses at the expense of their children and other heirs. *See* Kennedy Merits Brief at 59-63. Since this Court considers the number of states banning same-sex intimacy and enforcing the death penalty in constitutional cases, this Court should also consider the collective wisdom of 45 legislatures when determining federal common law. *See, e.g., Manning*, 212 F.3d at 871. Disputes between beneficiaries arise because divorcing spouses reasonably place their trust in the enforceability of the express, written waivers their spouses sign in court – decisions approved of for decades by a large majority of this nation's courts. Continued recognition of a waiver rule under the federal common law – rather than repudiation of long-standing ERISA waiver precedent – comports with this Court's presumption favoring

the continuation of judge-made law. *Midlantic,* 474 U.S. at 501.

Rejection of DuPont's proposed "Plan Documents" Rule would not conflict with *Egelhoff v. Egelhoff,* 532 U.S. 141, 147-48 (2001) and *Boggs v. Boggs,* 520 U.S. 833 (1997), where state statutes overrode plan beneficiary-status. Neither case concerned a knowing, voluntary waiver of a beneficiary designation under federal common law.

II. Application of DuPont's "Plan Documents" Rule to beneficiary designations would result in absurd and adverse consequences.

A. Treating beneficiary designations as "Plan Documents" when they are not, and precluding federal common law enforcement of voluntary, written waivers, conflicts with Congress' effort to create a uniform, federal common law of ERISA including judicial consideration of all relevant evidence.

DuPont's "Plan Documents" Rule, which trumps a voluntary, written waiver, would thwart ERISA's policy of fostering a uniform, federal common law of ERISA. This Court can create a uniform federal ERISA rule of waiver consistent with dozens of this Court's decisions by holding that a party enforcing an express waiver in a written divorce decree or property settlement must prove "a voluntary relinquishment of

a known right" under RESTATEMENT OF CONTRACTS (SECOND) § 84 comment b (1981).

The Restatement's rule of voluntary waiver is simple and clear. Judicial enactment of DuPont's "Plan Documents" Rule would replace such a uniform national standard with a welter of thousands of conflicting "plan document" approaches, increasing administrator uncertainty while multiplying costly litigation at the expense of plans, participants, and beneficiaries.

Real world plan administrators can never limit their gaze solely to beneficiary designations. To carry out their fiduciary duties, they must always examine QDROs, QPSAs, QJSA spousal-consent forms, birth and death certificates, adoption papers, common law marriage affidavits, and the statutes and precedent of states recognizing same sex marriages and unions. *See* Kennedy Reply Brief at 28-31.

DuPont justifies its "Plan Documents" Rule on the grounds that only lawyers can determine whether a waiver is voluntary. DuPont ignores real world waivers. Hundreds of thousands of non-lawyers – *e.g.*, police officers, deputies, constables, and justices of the peace – decide whether a suspect's waiver of *Miranda* rights is knowing and voluntary millions of times a year. Nurses and hospital personnel decide whether a patient seeking medical care has voluntarily waived rights through consent forms. Waivers of jury trial are common place.

Judicial repudiation of waivers based solely on the penumbra of 29 U.S.C. § 1104(a)(1)(D) would undermine respect for waivers under federal law – including ERISA-related waivers of liability incidental to medical care, the exercise of HIPAA privacy rights, and the receipt of COBRA insurance payments.

Precluding judicial review of beneficiary designations would incentivize divorcing spouses to commit fraud during settlement negotiations. Unscrupulous attorneys would have reason to encourage a divorcing client to sign a waiver to secure desired property, while suggesting that the client later cheat, retreat, and repudiate the waiver.

Given the clarity of Liv's and William Kennedy's agreement about Liv's waiver of all right, title, interest in and claim to William's 401k benefits at DuPont, William's elimination of Liv as beneficiary in the one DuPont plan not covered by the divorce decree or the one QDRO both divorces executed, and the absence of any remarriage, there is no reasonable doubt that William expected Liv to waive any claim to his 401k benefits. *See* Kennedy Merits Brief at 40-43. Long-established precedent requires enforcement of beneficiary designations in accord with the reasonable expectations of the participant. *See Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 269 (4th Cir. 2002).

DuPont's proposed rule would privatize ERISA's payment provisions without congressional authorization and delegate vast, largely-unchecked power to administrators. A decision focusing solely on a beneficiary designation would deprive courts of their traditional power to render justice based on all relevant evidence.

Must future courts ignore ambiguous "plan documents" or designations that confuse or confound participants, beneficiaries, and judges? What if the boxer George Foreman – all of whose five sons are named George Foreman – identifies "George Foreman" as his sole beneficiary without specifying which George should receive his benefits?

What if the participant designates his lawyer as his sole beneficiary, at the expense of his minor children? Does the "Plan Documents" Rule preclude a court from invalidating a designation based on self-dealing?

How about spouse-slayers and parricides? Does the slayer profit merely because his name appears on a designation?

Must a court stand mute while a plan-administrator pays pension proceeds to someone who is incompetent or *non compos mentis* beneficiary?

DuPont's expansion of the Plan Documents Rule to beneficiary designations would wreak havoc on the Treasury's acceptance of disclaimers and waivers under Section 2518(b) of the Internal Revenue Code,

Treasury's regulations, and state law. *See* I.R.S. GEN. COUNSEL MEM. 39,858, 1991 WL 776304 (Sept. 23, 1991); United States' *Amicus* Brief at 18. DuPont's rule subordinates waivers and disclaimers to plan "documents" Congress never defined as such while denying those who rely on waivers meaningful judicial review.

B. DuPont's "Plan Documents" Rule would reward children and spouses who slay their participant parents and spouses.

By precluding any challenge to an on-file beneficiary designation, DuPont's "Plan Documents" Rule would preclude courts from exercising their federal common law power to deny benefits to children and spouses who murder participant parents and spouses. *Keen v. Weaver,* 121 S.W.3d 721, 726 n.4 (Tex. 2003). *See* Kennedy Merits-Brief at 60-63. It is difficult to believe that the 1974 Congress that enacted ERISA – a Congress highly critical of corporate power, the Vietnam War, and President Nixon – created a "Plan Documents" statute that so radically recast trust, probate, and estate law without expressly signaling that intent.

III. DuPont's Plan Administrator breached the Plan's 29 U.S.C. § 1104(a)(1)(B) fiduciary duty to the Estate by failing to consider the divorce decree waiver, despite DuPont's prepayment receipt and maintenance of those papers as "a record of DuPont with regard to the SIP account...with other DuPont records relating to Mr. Kennedy's SIP account...."

If the "Plan Documents" Rule ensures that a plan has all relevant papers necessary to make a benefits-determination, the Estate satisfied that purpose here. DuPont's Plan Administrator, Mary Dineen, had everything a reasonable person would need under 29 U.S.C. § 1104(a)(1)(B) to recognize a dispute between contending beneficiaries. Ms. Dineen failed to consider the voluntary waiver in the Kennedy divorce decree, despite her receipt of the Estate's demand letter and its copy of that divorce decree. She was "not qualified to provide a legal interpretation" as a non-lawyer, she testified, and was "not authorized to secure a legal interpretation from any legal service or law firm other than the DuPont Legal Department." J.A. at 73. Ms. Dineen never stated that she had asked the DuPont Legal Department benefits lawyer for an opinion.

Ms. Dineen swore that she maintained those papers as "a record of DuPont with regard to the SIP account...with other DuPont records relating to Mr. Kennedy's SIP account...." She failed to recognize conflicting claims or file the interpleader most

administrators would have filed. *See* Kennedy Reply Brief at 31-33; *Atwater v. Nortel Networks, Inc.*, 388 F.Supp.2d 610, 616 (M.D. N.C. 2005) (administrator liability for paying proceeds to a participant's husband after his indictment for her murder but prior to his conviction); *Metro. Life Ins. Co. v. Hamm*, 2003 U.S. Dist. LEXIS 19839, 2003 WL 22518183, *5 (E.D. Pa. 2003) (an interpleader action was appropriate although the slayer-beneficiary had "not been arrested, formally charged, or convicted of homicide"); *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436, 442 (2d Cir. 2002) (allowing interpleader to determine the proper beneficiaries).

By doing what was merely "convenient" rather than what was right, DuPont's Plan Administrator wrongfully paid pension benefits to an ex-spouse who had voluntarily and expressly waived them in court.

CONCLUSION

Petitioner Kari Kennedy, Independent Executrix of the Estate of William Kennedy, requests this Court to REVERSE the August 15, 2007 decision of the Fifth Circuit and to REINSTATE the October 5, 2005 judgment of the Eastern District of Texas.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

No. 07-636

In the Supreme Court of the United States

KARI E. KENNEDY, PETITIONER

v.

PLAN ADMINISTRATOR FOR
DUPONT SAVINGS AND INVESTMENT PLAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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By order dated October 28, 2008, the Court directed the parties and permitted amici to file briefs addressing the following question: "Whether 29 U.S.C. 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy, even on the assumption that a waiver of her interest was not otherwise subject to statutory bar." As the government explained in its amicus brief (at 22-32), Section 1104(a)(1)(D) required the plan administrator in this case to pay benefits to Liv Kennedy, as the designated beneficiary of William Kennedy.

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires an employee benefit plan to "specify the basis on which pay-

ments are made to and from the plan," 29 U.S.C. 1102(b)(4), and requires a plan administrator to administer the plan "for the exclusive purpose" of "providing benefits to participants and their beneficiaries," 29 U.S.C. 1104(a)(1)(A), "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D). This Court has recognized that the obligation to administer a plan in accordance with plan documents includes the obligation to distribute benefits to a "beneficiary," a term defined in 29 U.S.C. 1002(8) to mean a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." See *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001); see also *Boggs* v. *Boggs*, 520 U.S. 833, 844-851 (1997).

The so-called plan documents rule serves important statutory interests. It promotes certainty for both plan participants and beneficiaries, thereby "enabl[ing] beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995). And it facilitates plan administration. The statutory rule that administrators administer plans in accordance with plan documents "minimiz[es] the administrative and financial burden[s] on plan administrators," and allows them to discharge their duties quickly and efficiently. *Egelhoff*, 532 U.S. at 149-150 (internal quotation marks and citation omitted).

2. The DuPont Savings and Investment Plan (SIP) at issue in this case contained several provisions specifying the basis on which payments were to be made to beneficiaries. The SIP provided that a participant could "designate any beneficiary or beneficiaries he chooses to receive all or part of his interests * * * in case of his death," as well as to "replace or revoke such

designation." J.A. 48. It provided that any designations had to be made "in the manner prescribed by the Company," J.A. 52, and the plan administrator provided forms for purposes of making and altering beneficiary designations. See, *e.g.*, J.A. 34, 56-57. Consistent with those provisions of the plan itself, the Summary Plan Description stated: "If you die before receiving your SIP account balances, your beneficiary(ies) will receive the balance in your accounts." J.A. 43. The plan itself and the Summary Plan Description are "documents and instruments governing the plan" under 29 U.S.C. 1104(a)(1)(D). See *Schoonejongen*, 514 U.S. at 83-84 (explaining that ERISA gives effect to the written plan documents scheme through a comprehensive set of reporting and disclosure requirements that includes obligations under 29 U.S.C. 1024(b)(2) and (4) to make available governing plan documents); 29 U.S.C. 1024(b)(2) (such documents include the summary plan description and the "bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated"); 29 U.S.C. 1024(b)(4) (similar).

In accordance with the plan's terms, William Kennedy signed a beneficiary-designation form naming his then-wife Liv Kennedy as his sole beneficiary for the SIP, and a second form naming Liv Kennedy as his sole beneficiary for another plan that would later merge into the SIP. J.A. 27-28; see Pet. App. 2, 32-33. The Kennedys divorced in 1994. *Id.* at 2. Although William Kennedy later submitted a new form designating his daughter, Kari Kennedy, as his beneficiary for the DuPont Pension and Retirement Plan, thereby revoking any previous designations, J.A. 62, he never revoked his des-

ignation of Liv Kennedy as his beneficiary for the SIP, Pet. App. 3.

Petitioner argues (Reply Br. 23-26) that William Kennedy's beneficiary designation is not controlling because neither ERISA nor DuPont defined beneficiary designations as plan documents. But whether a beneficiary-designation form itself is one of the "documents and instruments governing the plan" under Section 1104(a)(1)(D) is irrelevant. Petitioner does not dispute that the SIP and the Summary Plan Description *are* plan documents, see 29 U.S.C. 1024(b)(2) and (4), and those documents made clear that the plan administrator would pay benefits to a participant's designated beneficiary, and that any changes to the participant's beneficiary designation had to be made in the manner prescribed by the plan. Thus, when William Kennedy died in 2001, the plan documents required the plan administrator to distribute the balance in his account to Liv Kennedy, as William Kennedy's designated beneficiary. Pet. App. 3, 33.

3. Petitioner's primary contention is that, instead of distributing benefits in accordance with the plan documents, the plan administrator should have given effect to a state-court divorce decree that awarded to William Kennedy, and simultaneously divested Liv Kennedy of, "all right, title, interest, and claim" to, *inter alia*, William Kennedy's pension plan benefits. Pet. App. 64-65. According to petitioner (Pet. Br. 17), by consenting to that division of property, Liv Kennedy effectively waived her beneficiary interest in any SIP benefits payable with respect to William Kennedy. Petitioner argues (Pet. Br. 14-15, 47-52) that, as a matter of federal common law, the plan administrator was required to enforce Liv Kennedy's divorce-decree waiver—even though, because William Kennedy never revoked his earlier ben-

eficiary designation, Liv Kennedy remained William Kennedy's sole beneficiary for the SIP.[1]

Petitioner's argument rests on the premise that, in the absence of a provision in ERISA that specifically addresses waivers by a beneficiary, courts may fill that supposed gap by requiring plan administrators to give effect to beneficiary waivers as a matter of federal common law. See Pet. Br. 12-13 (citing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989)). As petitioner notes, a number of courts of appeals and state supreme courts have endorsed that proposition. See Pet. Br. 31-33 (citing cases). The premise is, however, flawed. A rule that required plan administrators to recognize a waiver contained in a state-court divorce decree, even when the participant has not taken the steps necessary to effectuate the waiver, would allow the state-court decree to trump the beneficiary designated according to the plan. It therefore would conflict with the plan administrator's duties under ERISA. As this Court has explained, "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted); see also *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 831-832 (2003).

This Court has previously rejected rules that would require plan administrators to pay ERISA plan benefits to persons other than those designated as beneficiaries in accordance with plan terms. In *Boggs*, the Court held that ERISA preempted application of state community

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[1] As the government noted in its amicus brief (at 30), the SIP did provide for qualified tax disclaimers under 26 U.S.C. 2518. J.A. 50. Petitioner does not, however, contend that Liv Kennedy disclaimed her right to receive benefits in a manner that complied with Section 2518.

property laws insofar as they permitted a nonparticipant spouse to transfer, by will, an asserted community-property interest in undistributed pension plan benefits. 520 U.S. at 848-851. The Court reasoned that such an application of state law was inconsistent with the principle that pension plan benefits are to be paid only to beneficiaries designated either by the participant or under the terms of the plan, and would effectively "create a new class of persons for whom plan assets are to be held and administered." *Id.* at 850. ERISA, the Court concluded, "is not amenable to this sweeping extratextual extension." *Ibid.*

Later, in *Egelhoff*, the Court held that ERISA preempted, as applied to ERISA pension plan benefits, a state statute providing that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce. 532 U.S. at 143. The Court reasoned that the state statute, which would forbid plan administrators from "mak[ing] payments simply by identifying the beneficiary specified by the plan documents," created a "direct[] conflict[] with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Id.* at 148, 150; see *id.* at 147 n.1 (identifying "the conflict between the plan documents (which require making payments to the named beneficiary) and the statute (which requires making payments to someone else)"). Further, the Court noted, the state statute would undermine ERISA's aim of "nationally uniform plan administration" and impose substantial burdens on plan administrators. *Id.* at 148; see *id.* at 146-150.

Similar principles apply here. Although petitioner seeks to distinguish *Egelhoff* and *Boggs* on the ground that the question in those cases concerned whether

ERISA preempts "one of fifty different [state] statutes," as opposed to the development of a federal-common-law rule, Pet. Br. 16, the common-law rule she urges creates no less of a conflict with ERISA's command that plan administrators distribute benefits to individuals who are "beneficiaries," in accordance with plan terms.

The federal-common-law rule petitioner proposes would also undermine the principles of certainty and plan administrability that underlie that command. Such a common-law rule requires plan administrators to "examine a multitude of external documents that might purport to affect the dispensation of benefits," *Estate of Altobelli* v. *IBM*, 77 F.3d 78, 82-83 (4th Cir. 1996) (Wilkinson, J., dissenting), and to decide among the "myriad of tests" courts have developed to determine whether language in a domestic relations order is sufficient to constitute a valid waiver, *Strong* v. *Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 332 (Neb. 2005) (Connolly, J., dissenting); see U.S. Amicus Br. at 27 n.9 (citing cases). In some instances, it would be difficult if not impossible to determine the parties' intent. See West. Conference Teamsters Amicus Br. 14-16. Evaluating waivers would delay the payment of benefits to designated beneficiaries. Resp. Br. 38. And plan administrators would inevitably be drawn, as the plan administrator was in this case, see Pet. App. 41-43, into litigation regarding whether language in a divorce decree constituted a knowing and voluntary waiver of a beneficiary interest in pension plan benefits.

Requiring plan administrators to undertake such a review also would create a risk of inconsistent interpretations of identical divorce decrees, thus undermining the interest in nationally uniform plan administration, see *Egelhoff*, 532 U.S. at 148, as well as a substantial

"risk of litigation and administrative burdens." *McGowan* v. *NJR Serv. Corp.*, 423 F.3d 241, 247 (3d Cir. 2005) (opinion of Van Antwerpen, J.), cert. denied, 127 S. Ct. 1118 (2007). By contrast, adherence to ERISA's statutory directive that plan administrators pay benefits only to persons authorized to receive them under the terms of the plan avoids that result. See, *e.g.*, *McMillan* v. *Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) ("If the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary, thus avoiding expensive litigation."); *Fox Valley & Vicinity Constr. Workers Pension Fund* v. *Brown*, 897 F.2d 275, 283 (7th Cir.) (Easterbrook, J., dissenting) ("Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules."), cert. denied, 498 U.S. 820 (1990).

As Amicus AARP explains, ERISA provides a simple method for a plan participant to eliminate a divorcing spouse's interest in pension plan benefits: participants can "review their beneficiary designations when they experience a life change such as marriage, divorce or widowhood, and * * * follow the terms of their plan to make any changes, as they see fit." AARP Amicus Br. 12; see also U.S. Amicus Br. 28. ERISA leaves no room for courts to fashion the federal-common-law rule petitioner urges.

4. Seeking to minimize the conflict between her proposed federal-common-law rule and Section 1104(a)(1)(D), petitioner notes (Reply Br. 26-27, 28) that ERISA expressly requires plan administrators to give effect to certain external documents, such as qualified domestic relations orders (QDROs) under 29 U.S.C.

1056(d)(3). In petitioner's view, the QDRO provision "suggests that Congress simply did not see a conflict" with Section 1104(a)(1)(D). Reply Br. 26-27. But as we have explained (U.S. Amicus Br. 25-26), that is because Congress was careful, in enacting the QDRO provision, to provide numerous safeguards that minimize the burden on the plan administrator and that ultimately treat the terms of the QDRO as if they were part of the plan itself and treat the alternate payee under the QDRO as a beneficiary under the plan. See 29 U.S.C. 1056(d)(3)(A) ("Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order."); 29 U.S.C. 1056(d)(3)(G) (the plan administrator must decide whether a domestic relations order is qualified, based on specific statutory criteria); 29 U.S.C. 1056(d)(3)(J) ("A person who is an alternate payee under a qualified domestic relations order shall be considered * * * a beneficiary under the plan."). Thus, contrary to petitioner's contention, the QDRO provision demonstrates a continuing commitment to the principle that a plan administrator must pay benefits, and administer the plan, according to plan documents. See *Boggs*, 520 U.S. at 847 (in enacting the QDRO provision, Congress was careful to "conform[] entitlements to benefits with participant or beneficiary status"). Petitioner's proposal, by contrast, would be fashioned by the courts, not Congress, and it would require the payment of benefits to someone who is *not* a beneficiary under the plan.

Petitioner also suggests (Reply Br. 28-31) that, to comply with the spousal protection provisions of 29 U.S.C. 1055, plan administrators must undertake difficult inquiries into marital status. But when plan administrators undertake such inquiries, they do so to *effectu-*

ate the terms of the plan and of the statute, not to override them. See 29 U.S.C. 1055(a) and (b)(1)(C)(i) (requiring plans to provide for certain spousal protections); cf. J.A. 43-44 (SIP Summary Plan Description).[2] And inquiring whether a plan participant has a "spouse" entitled to the protections of Section 1055 is generally far less burdensome than inquiring whether a former spouse has made a sufficiently clear, knowing, and voluntary waiver of beneficiary rights as part of a divorce settlement.

5. Petitioner argues (Reply Br. 16-18) that William Kennedy's estate is a beneficiary under the SIP because William Kennedy's change of beneficiary for another DuPont plan should be construed to remove Liv Kennedy as the beneficiary on the SIP plan. Petitioner did not present that argument to the court of appeals, and the court of appeals accordingly did not address it. This Court should decline to address the argument in the first instance. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998). In any event, petitioner stipulated in the district court that William Kennedy "never executed any forms or documents to remove or replace Liv Kennedy as his sole beneficiary under either the SIP or [a plan that merged into the SIP]." J.A. 28. The designation that William Kennedy filled out

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[2] Courts of appeals have recognized that a plan administrator may, in certain circumstances, have to consider external documents to determine whether the plan's terms have been met. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Johnson*, 297 F.3d 558, 567-568 (7th Cir. 2002) (considering whether participant substantially complied with instructions on changing a beneficiary). At least one court has also concluded that 29 U.S.C. 1104(a)(1)(D) does not preclude consideration of whether a beneficiary designation results from fraud or undue influence. *Tinsley* v. *General Motors Corp.*, 227 F.3d 700, 704 & n.1 (6th Cir. 2000). Neither of those factual scenarios is present here.

for another plan is limited to that plan. The plan administrator was not required to construe it as a designation for the SIP. See J.A. 62.

6. Finally, contrary to petitioner's suggestion (Reply Br. 33-34), just as the terms of the divorce decree cannot be given effect as a "waiver" under a rule of *federal* common law, neither could the waiver be enforced as a matter of *state* law in a suit against the designated beneficiary after the benefits have been paid out. Because the "waiver" does not trump the designation under the plan, the assets paid out by the plan belong to the beneficiary as a matter of federal law.

* * * * *

For the foregoing reasons and those stated in our amicus brief, the judgment of the court of appeals should be affirmed on the ground that 29 U.S.C. 1104(a)(1)(D), mandating administration of a plan in accordance with plan documents, required that the distribution in question be made to Liv Kennedy.

Respectfully submitted.

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